No. 76-1151

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

RICHARD A. ALLEN,
Assistant to the Solicitor General,

SIDNEY M. GLAZER,
HOWARD WEINTRAUB,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision involved	2
Statement	2
Reasons for granting the writ	7
Conclusion	20
Appendix A	1a
Appendix B	21a
Appendix C	23a
Appendix D	25a
Appendix E	39a

CITATIONS

Cases:

Alderman v. *United States*, 394 U.S. 165 10
Brown v. *Illinois*, 422 U.S. 590 .....14, 17
Brown v. *United States*, 375 F. 2d 310, certiorari denied, 388 U.S. 915 .....15, 19
Brown v. *United States*, 411 U.S. 223 10
Desist v. *United States*, 394 U.S. 244 ....8–9, 10
Edwards v. *United States*, 330 F. 2d 849 15
Frisbie v. *Collins*, 342 U.S. 519 19
Harris v. *New York*, 401 U.S. 222 11
Harrison v. *United States*, 392 U.S. 219 13
Linkletter v. *Walker*, 381 U.S. 618 .....9, 10
Michigan v. *Tucker*, 417 U.S. 433 ..... 8, 9
McLindon v. *United States*, 329 F. 2d 238 15
Nardone v. *United States*, 308 U.S. 338 14
Oregon v. *Hass*, 420 U.S. 714 11

Page

Cases—Continued
Parker v. *Estelle*, 498 F. 2d 625, certiorari denied, 421 U.S. 963 17
Smith v. *United States*, 324 F. 2d 879, certiorari denied, 377 U.S. 954 .....15, 18
Smith v. *United States*, 344 F. 2d 545 15
Stone v. *Powell*, No. 74–1055, decided July 6, 1976 8
United States v. *Beasley*, 485 F. 2d 60, certiorari denied, 416 U.S. 941 17
United States v. *Brignoni-Ponce*, 422 U.S. 873 13
United States v. *Crouch*, 528 F. 2d 625, certiorari denied, No. 75–6985, October 18, 1976 16–17
United States v. *Evans*, 454 F. 2d 813, certiorari denied, 406 U.S. 969 17
United States v. *Guana-Sanchez*, 484 F. 2d 590, certiorari granted, 417 U.S. 967, certiorari dismissed as improvidently granted, 420 U.S. 513 17
United States v. *Hoffman*, 385 F. 2d 501, certiorari denied, 390 U.S. 1031 17
United States v. *Janis*, No. 74–958, decided July 6, 1976 8
United States v. *Jenkins*, 420 U.S. 358 6
United States v. *Karathanos*, 531 F. 2d 26, certiorari denied, No. 75–1402, July 6, 1976 14
United States v. *Mandujano*, 425 U.S. 564 11
United States v. *Marder*, 474 F. 2d 1192 15
United States v. *Mullens*, 536 F. 2d 997 14
United States v. *Peltier*, 422 U.S. 531 .....8, 10

Page

Cases—Continued
United States v. *Raftery*, 534 F. 2d 854, certiorari denied, October 4, 1976, No. 76–5007 12
United States v. *Scios*, No. 75–1619, decided August 23, 1976, petition for rehearing pending 14
United States v. *Tane*, 329 F. 2d 848 14
United States v. *Turk*, 526 F. 2d 654, certiorari denied, October 4, 1976, No. 76–5007 12
Walder v. *United States*, 347 U.S. 62 11
Wong Sun v. *United States*, 371 U.S. 471 14
Constitutions and statutes:
United States Constitution, Fourth Amendment 2
18 U.S.C. 1623 2

OCTOBER TERM, 1976

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 542 F.2d 136. The oral opinion of the district court (App. D, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on September 15, 1976. A petition for rehearing and suggestion for rehearing *en banc* was denied on December 21, 1976 (App. C, *infra*). On January 13, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including February 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the exclusionary rule prevents the use of the fruits of an illegal search in a prosecution for perjury committed after the search.

2. Whether the exclusionary rule requires the suppression of the trial testimony of a witness whose identity or whose possession of relevant information was learned as the result of an illegal search.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of New York, respondent was found guilty of one count of making a false declaration before a federal grand jury investigating gambling operations, in violation of 18 U.S.C. 1623. The district judge thereupon immediately set aside his finding on the ground that the testimony of government witness Lois Hennessey should be suppressed as the fruit of an unlawful search of an envelope on a counter in respondent's flower shop (App.

D, *infra*, pp. 24a, 34a). On the government's appeal, the court of appeals affirmed (App. A, *infra*, pp. 1a–20a).

1. The evidence showed that in the second half of 1973, F.B.I. agents conducted an investigation of gambling in North Tarrytown, New York, that included a surveillance of respondent's flower shop, a place that was frequently visited by Francis J. Millow, a target of the investigation. Their observations led them to conclude that the flower shop was either a drop spot or pickup spot for policy gambling operations. The surveillance was discontinued in December 1973 (Tr. 302–308, 314–316).

On December 18, 1974, uniformed police officer Ronald Biro, who had been assigned to patrol school crossings on that day, entered respondent's shop on a cigarette break. Biro was acquainted with Lois Hennessey, an employee in respondent's shop, and as he talked with her he observed an envelope on the top of the cash register drawer with money protruding from it. Biro picked up the envelope, looked through its contents, observed that the envelope also contained policy slips, and put the contents back in the envelope. He then placed the envelope back on the cash register (Tr. 66, 99–103, 117, 143, 184–189, 200–202).

Hennessey was reading a newspaper while Biro examined the envelope, and Biro did not inform her of what he had discovered (Tr. 102, 143–144, 202). In response to Biro's inquiry as to whose envelope it was, Hennessey replied that it was respondent's and that respondent had told her to give the envelope to someone. Biro did not ask her who the intended recipient

was. Biro then left respondent's shop. (Tr. 66, 102–103, 187–188, 202–203). At the time he examined the envelope, Biro was unaware that a gambling investigation of the shop had been undertaken and had no reason to suspect that Hennessey was giving envelopes with policy wagers to Millow or anyone else (Tr. 203–204, 206–207, 223).[1]

On the following day, Biro mentioned what he had observed in the flower shop to other local police officers (Tr. 203–204), who in turn informed F.B.I. Agent A. Lance Emory that Biro had seen an envelope containing gambling records in the flower shop. Emory assumed that the information that was relayed to him had been legally obtained (Tr. 360–362, 368, 482).

Approximately four months later, in March or April 1975, Emory conferred with Lois Hennessey at her home for about 15–20 minutes, in the presence of her mother and two sisters. After identifying himself, Emory told Hennessey that he had learned through the police department that she was employed by respondent and that the "Government was interested in any information she might provide regarding incidents in [respondent's shop]" (Tr. 108–112, 124–125, 153–154, 363–365, 369, 372, 390–391, 397–398). Hennessey, who was then studying police science in college and was interested in police work, said that "she would be willing to help the Government" (Tr. 390). Although Emory did not specifically refer to the Biro incident during the course of their meeting, and Hennessey

[1] Respondent was not present at the time Biro was in the shop, and it was not until shortly before trial that he became aware of Biro's search (App. A, *infra*, p. 4a).

testified that the incident "wasn't on my mind" at the time, she related the events of that day to Emory (Tr. 109, 111–112, 125–126, 365–367, 371, 389). Thereafter, Emory informed an attorney for the Department of Justice about Hennessey (Tr. 392, 402–403).

In May 1975, both Hennessey and respondent were subpoenaed to testify and did testify before the grand jury. In his testimony on May 12, respondent unequivocally denied that he ever took policy bets at his shop for Millow (Govt. Ex. 2).[2]

Respondent's grand jury testimony was shown to be false at trial by the testimony of Hennessey. She testified that she had observed customers place policy and football bets with respondent and that those bets were then given by respondent to Millow, who would come into respondent's shop almost daily (Tr. 67–74, 80–85, 89, 113–114, 117, 141–142). A tape recording of an intercepted telephone conversation between respondent and Millow also implicated respondent in gambling activity (Tr. 339–341), as did the evidence of the physical surveillance of respondent's shop (Tr. 302–308, 315–316).

2. At the conclusion of the trial, the district court found respondent guilty of perjury.[3] After making this

[2] A witness at respondent's trial testified (Tr. 166–167) that she was present during a conversation between respondent and Millow on May 9, three days prior to respondent's grand jury appearance, at which Millow told respondent "[y]ou are going downtown Monday to see the big boys * * * and whatever they ask you, just tell them you don't remember, because if you don't remember, that is not lying" (Tr. 168).

[3] Respondent was acquitted on a second count of perjury,

finding however, the court granted respondent's motion to suppress Hennessey's testimony,[4] on the basis of the court's determination that her testimony at trial was tainted by the fact that her potential as a witness "first came directly to the attention of the government as a result of an illegal search" and that the government "has not sustained its burden of showing that Lois Hennessey's testimony definitely would have been obtained without the illegal search" (App. D, *infra*, pp. 26a–27a). The court concluded that, without her testimony, there was insufficient evidence of respondent's guilt (App. D, *infra*, p. 30a).

3. On the government's appeal, a divided court of appeals affirmed (App. A, *infra*).[4a] The court rejected the government's contention that the testimony of Lois Hennessey "was an act of free will sufficient to purge the taint of any unlawful invasion * * * on December 18, 1974" (App. A, *infra*, p. 12a). Noting that the F.B.I. agent had sought out Hennessey, it concluded that the district court's suppression of Hennessey's testimony was proper because "the road to Miss Hennessey's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted" (App. A, *infra*, p. 13a). The court also rejected the government's argument that the exclusionary rule should not be applied when the evidence derived from the search is being used to prove an independent crime, here perjury, that occurred long after the unlawful intrusion (*id.* at 13a–15a).

Judge Van Graafeiland, dissenting, urged that the doctrine of attenuation of taint should have different application when the evidence under consideration is the testimony of a live witness. Since Hennessey was not coerced by the government into becoming a witness, and her testimony was clearly established as being the product of her " 'willingness to cooperate with the FBI' " (App. A, *infra*, p. 18a), Judge Van Graafeiland concluded that the testimony should be admissible because the factor of the witness's willingness to cooperate sufficiently purged the taint of the prior search (*id.* at 17a–18a). Aligning himself with decisions of the United States Court of Appeals for the District of Columbia Circuit, he noted that there "is a marked difference * * * between our holdings and those of [that court] which should, perhaps, be resolved by the Supreme Court" (*id.* at 17a, n. 3). In his view, the majority's decision could only be "attributed to its disenchantment with the attenuation rule itself, not the application of the rule to the facts of this case" (*id.* at 19a–20a).

REASONS FOR GRANTING THE WRIT

This case presents two important questions concerning the application of the exclusionary rule: first, whether the rule requires the exclusion of the fruits of

---

which charged that he had made false statements in the grand jury when testifying that he did not know that one Hank Bucci was involved in gambling operations.

[4] Before the evidence was presented, respondent had made a motion to exclude the testimony of Lois Hennessey on the ground that her identity was procured as a result of an illegal search. The court reserved decision on the motion until the trial was completed (Tr. 17–19).

[4a] The court first held (App. A, *infra*, p. 7a) that the government could appeal the ruling of the district court. This conclusion was plainly correct. See *United States* v. *Jenkins*, 420 U.S. 358, 365.

an illegal search when they are introduced to prove a crime that was neither committed nor foreseeable at the time of the search; and second, whether the rule requires the exclusion of the testimony of a live witness whose identity or whose possession of relevant information was learned as a result of an illegal search. Both issues have generated conflicting courts of appeals decisions, and review by this Court is appropriate both because of the inherent significance of the issues and in order to resolve the conflict among the circuits.

1. The suppression of the fruits of an unlawful search in a prosecution for an independent offense committed long after the search is contrary to the policies underlying the exclusionary rule, which "has never been interpreted to proscribe the use of illegally seized evidence in all procedings, or against all persons" and which, in view of its substantial societal costs, is to be carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348. See also *Stone* v. *Powell*, No. 74–1055, decided July 6, 1976, slip op. 19.

The primary objective, if not the sole objective, of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States* v. *Calandra*, *supra*, 414 U.S. at 347. Accord, *e.g.*, *United States* v. *Janis*, No. 74–958, decided July 6, 1976, slip op. 13; *Stone* v. *Powell*, *supra*, slip op. 18–19; *United States* v. *Peltier*, 422 U.S. 531, 536–539; *Michigan* v. *Tucker*, 417 U.S.

433, 446–447; *Desist* v. *United States*, 394 U.S. 244, 254 n. 24; *Linkletter* v. *Walker*, 381 U.S. 618, 636–637. Accordingly, this Court has declined to apply the exclusionary rule in circumstances where exclusion would have a minimal deterrent effect on police misconduct and where exclusion would frustrate significant public interests.

Thus, in *Calandra*, the Court declined to apply the exclusionary rule to prohibit the government from asking a grand jury witness questions based on information obtained in an illegal search. The Court observed that such an "extension of the exclusionary rule would seriously impede the grand jury" and stated that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." 414 U.S. at 349, 351. In *Janis*, the Court declined to apply the exclusionary rule to bar evidence illegally seized by a state officer from admission in a federal civil tax proceeding, reasoning that "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation" (slip op. 20). In *Michigan* v. *Tucker*, the Court held that the *Miranda* exclusionary principle did not apply to bar the testimony of a witness who was identified by the defendant in the course of questioning that followed inadequate warnings, in part on the ground that the "deterrent effect on future police conduct [of] the exclusion of [the defendant's] statements * * * would [not] be significantly augmented by exclud-

ing the testimony of the witness * * * as well" (417 U.S. at 448).[5]

The principle underlying the foregoing decisions applies with particular force to prosecutions for crimes committed after the unlawful police conduct has occurred, especially when, as in this case, the subsequent crime is independent of the purpose of the police investigation that embodied the unlawful search. It is difficult to imagine how police misconduct could be significantly deterred by the prospect of the exclusion of the fruits of a search in the prosecution of a crime that has not taken place and the commission of which is not foreseeable at the time of the search. However zealous they may be, law enforcement officials surely have little incentive to conduct illegal searches for evidence of crimes that have not yet taken place, particularly since their actions may jeopardize the prosecution of a crime that has taken place. Indeed, the potential for deterrence is even less than in cases such as *Calandra*, *Janis*, and *Michigan* v. *Tucker*, in which the Court has declined to apply the exclusionary rule.

There are especially compelling reasons, moreover, for declining to apply the exclusionary rule when the subsequently committed crime is perjury. This Court has held that the compelling public interest in securing

[5] The absence of significant deterrence benefits has also been the basis of decisions declining to apply exclusionary rules retroactively (see *United States* v. *Peltier*, 422 U.S. 531; *Desist* v. *United States*, 394 U.S. 244, 254, n. 24; *Linkletter* v. *Walker*, 381 U.S. 618, 636–637) and of decisions denying standing to persons who were not themselves the victim of unconstitutional searches. *Alderman* v. *United States*, 394 U.S. 165, 174–175; *Brown* v. *United States*, 411 U.S. 223.

truthful testimony—an objective that is essential to the very functioning of the judicial process—cannot permit the exclusionary rule to be used as a shield against legitimate grand jury investigations or as a license for perjury. *United States* v. *Calandra*, *supra*; *United States* v. *Mandujano*, 425 U.S. 564. See also *Oregon* v. *Hass*, 420 U.S. 714; *Harris* v. *New York*, 401 U.S. 222, and *Walder* v. *United States*, 347 U.S. 62, where the Court declined to apply the exclusionary rule to prohibit the government from impeaching false testimony by means of unlawfully obtained evidence.

The policies underlying those decisions should control the instant case. In *Mandujano*, the Court held that a defendant could be prosecuted for perjury even if his allegedly false grand jury testimony was procured without giving constitutionally required warnings. In *Hass*, *Harris*, and *Walder*, as here, the government sought to use unlawfully obtained evidence against perjury committed after the evidence was obtained. The fact that here, unlike those cases, the evidence is sought to be used directly in a prosecution for perjury rather than for the impeachment of false testimony given during the trial of some other charge is immaterial. In both situations the evidence is used against subsequent perjury, and its use is necessary to protect the judicial process from false testimony; moreover, the evidence may be as damaging to the defendant when used for impeachment as when used directly to prosecute for perjury.

The decision below is in direct conflict with decisions of the Fifth and the Ninth Circuits, which have held that the exclusionary rule does not prevent the use of

the fruits of an illegal search in a prosecution for perjury committed after the search. *United States* v. *Turk*, 526 F. 2d 654 (C.A. 5), certiorari denied, October 4, 1976, No. 75–1633; *United States* v. *Raftery*, 534 F. 2d 854 (C.A. 9), certiorari denied, October 4, 1976, No. 76–5007. The courts in those cases analyzed the policies of the exclusionary rule, as reflected in the decisions of this Court discussed above, and concluded that the marginal deterrent effect of suppressing the evidence did not outweigh the substantial interest in preventing perjured testimony.

In contrast, the conclusion of the court below that the exclusionary rule applies to the prosecution of subsequently committed crimes of any kind, including perjury, cited no authority and was made without analysis of the relevant policies underlying the exclusionary rule (App. A, *infra*, pp. 13a–15a). The court attempted to distinguish *Turk* and *Raftery* on the ground that the defendants in those cases were aware of the illegal searches when they gave their false testimony (App. A, *infra*, p. 14a), but such a distinction is untenable. The courts in *Turk* and *Raftery* relied primarily on the absence of significant deterrence benefits to be derived from applying the exclusionary rule to these circumstances and on the compelling public interest in truthful testimony. Those considerations are not affected by the witness's awareness or ignorance of the illegal search. In either case, the exclusionary rule should not apply.

2. The decision below also squarely presents the issue of whether and under what circumstances the "voluntary testimony of a witness at trial * * * is subject to

suppression as the fruit of an illegal search." [6] That is an important question that has been reserved by this Court (*United States* v. *Brignoni-Ponce*, 422 U.S. 873, 876, n. 2; *Harrison* v. *United States*, 392 U.S. 219, 223, n. 9) and upon which there is "marked difference" of opinion in the courts of appeals (App. A, *infra*, p. 17a, n. 3) which this Court should resolve.

The court of appeals concluded that because Hennessey's knowledge of the matters under investigation was discovered as a result of an illegal search, her trial testimony should be suppressed: "the road to Miss Hennessey's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted, and we would not hold her testimony admissible merely because her cooperation with the Government was not coerced" (App. A, *infra*, p. 13a). The court declined to consider the lapse of time between the search and Hennessey's testimony, the likelihood that Hennessey's utility as a witness would have been discovered quite apart from the improper search,[7] and the other evidence at trial which, as Judge Van Graafeiland observed (App. A, *infra*, pp. 18a–19a), clearly established that Hennessey's cooperation with the gov-

[6] *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 876, n. 2.

[7] The government contended on appeal, in addition to the issues raised in this petition, that Hennessey's testimony should have been admissible because the investigation would inevitably have disclosed her utility. The court of appeals rejected the factual premise for this contention (see App. A, *infra*, pp. 8a–11a). While we do not here seek review of the court's conclusion that the discovery of Hennessey was not inevitable, the court's decision, we believe that the likelihood that a live witness would become available apart from any illegal search is relevant to a proper analysis of the issue we do present.

ernment and her testimony were the product of her own free will. In sum, the court of appeals' analysis draws no distinction for purposes of the application of the exclusionary rule between the testimony of live witnesses and any other evidence that might be said to be the fruit of an illegal search.[8]

In our view there are significant differences between live witnesses and other types of evidentiary "fruits" of police misconduct, differences that relate to the fundamental policies of the exclusionary rule and that are implicit in the attenuation doctrine of the exclusionary rule, set forth in such cases as *Brown* v. *Illinois*, 422 U.S. 590; *Wong Sun* v. *United States*, 371 U.S. 471, 488; and *Nardone* v. *United States*, 308 U.S. 338, 341.

The difference between live witness testimony and other types of evidentiary fruits has been recognized and applied by the District of Columbia Circuit in several cases, the most recent of which is *United States* v. *Scios*, No. 75–1619, decided August 23, 1976 petition for rehearing pending (reproduced at App. E, *infra*), where the court held that the testimony of a witness was admissible after applying an analysis substantially different from that of the instant case. In

[8] That approach is reflected in other Second Circuit decisions. See, *e.g*, *United States* v. *Tane*, 329 F. 2d 848, 853 (C.A. 2), where the court suppressed the testimony of a witness whose identity was revealed by an illegal wiretap, because the "road from the tap to the testimony may be long, but it is straight." See also *United States* v. *Karathanos*, 531 F. 2d 26, 34–35 (C.A. 2), certiorari denied, No. 75–1402, July 6, 1976; but cf. *United States* v. *Mullens*, 536 F. 2d 997 (C.A. 2), where the court refused to suppress the confession of a defendant who presented himself to police officers and gave incriminating statements following an unlawful search of his home.

Scios agents illegally searched a file folder in the defendant's office and discovered the name of an individual who was subsequently contacted for questioning. After consulting with an attorney, the individual refused to testify before a grand jury unless immunized, was given immunity, and then testified as a grand jury witness against the defendant. The court of appeals, after applying the principles set forth in *Brown* v. *Illinois*, *supra*, ruled that the prospective trial testimony of the witness was admissible, concluding that the lapse of time and other intervening events sufficiently dissipated the taint of the illegal search as to make the witness's testimony the product of his free will (App. E, *infra*, pp. 48a–56a). The court also concluded that the inspection of the file folder was not sufficiently flagrant to warrant suppression of the witness's testimony and that the "the deterrent purpose of exclusion would be minimally advanced in this case" by barring the witness from testifying (*id.* at 57a).[9]

Other circuits have applied a similar approach and have considered a variety of factors in determining whether live-witness testimony should be suppressed. For example in *United States* v. *Marder*, 474 F. 2d 1192, 1196 (C.A. 5), the court said:

[9] The approach in *Scios* follows other decisions of the District of Columbia Circuit, which have generally held the testimony of live witnesses admissible. See *Brown* v. *United States*, 375 F. 2d 310, 313–315 (C.A.D.C.), certiorari denied, 388 U.S. 915 (testimony admitted); *Smith* v. *United States*, 344 F. 2d 545 (C.A.D.C.) (testimony not admitted); *Edwards* v. *United States*, 330 F. 2d 849 (C.A.D.C.) (testimony admitted); *Smith* v. *United States*, 324 F. 2d 879, 881–882 (C.A.D.C.), certiorari denied, 377 U.S. 954 (testimony admitted). Cf. *McLindon* v. *United States*, 329 F. 2d 238 (C.A.D.C.).

> Proof that the witness would have come forward by his own volition, regardless of his identification by the illegal search, would be extremely relevant to a determination of attenuation. *United States* v. *Hoffman*, 385 F.2d 501, 504 (7th Cir. 1967) [certiorari denied, 390 U.S. 1031]. Likewise, evidence that the witness was completely uncooperative when originally discovered by the illegal search but later changed his attitude and supplied the necessary information, would tend to prove the attenuation of the original taint. See *Smith & Bowden* v. *United States*, 324 F.2d 879, 882, 117 U.S.App.D.C. 1 (1963) [certiorari denied, 377 U.S. 954]. This is certainly not an exhaustive list of the factors to be considered. Only reasoned judgment will determine whether the necessary circumstances exist which call for the application of the attenuation rule to so called "live testimony." [10]

There are, as the cases indicate, a variety of possible approaches to the question of live witness testimony. At one extreme, reflected in the opinion below, live witness testimony is treated no differently from other evidentiary fruits and is suppressed whenever the identity and usefulness of the witness came to the attention of law enforcement officials as a result of an unlawful

[10] In *Marder*, the court held that the testimony should not have been admitted but that its admission was harmless. Other courts applying the balancing test have generally held the testimony admissible. See *United States* v. *Crouch*, 528 F. 2d

search. Such an approach, we submit, is contrary to the principles of *Brown* v. *Illinois* and *Wong Sun*, *supra*, in which the Court recognized that testimonial evidence may—depending on such factors as the time interval between the misconduct and the receipt of the evidence, intervening circumstances, and the purposes and flagrancy of the misconduct—be "sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the [testimonial evidence]." *Brown* v. *Illinois*, *supra*, 422 U.S. at 603.[11]

625, 630 (C.A. 7), certiorari denied, No. 75–6985, October 18, 1976 (testimony admitted); *Parker* v. *Estelle*, 498 F. 2d 625, 629–630 (C.A. 5), certiorari denied, 421 U.S. 963 (testimony admitted); *United States* v. *Hoffman*, 385 F. 2d 501, 504–505 (C.A. 7), certiorari denied, 390 U.S. 1031 (testimony admitted); *United States* v. *Evans*, 454 F. 2d 813, 817–818 (C.A. 8), certiorari denied, 406 U.S. 969 (testimony admitted); *United States* v. *Beasley*, 485 F. 2d 60, 63–64 (C.A. 10), certiorari denied, 416 U.S. 941 (testimony admitted). See also *United States* v. *Guana-Sanchez*, 484 F. 2d 590, 592–596 (C.A. 7) (Pell, J., dissenting), certiorari granted, 417 U.S. 967, certiorari dismissed as improvidently granted, 420 U.S. 513.

[11] Application of those considerations to the instant case should result in the admissibility of Hennessy's testimony. With respect to temporal proximity, Hennessy was not contacted for questioning until four months after the search that suggested her as a potential witness and did not testify at trial for another six months. Moreover, when she was first contacted for questioning she expressed a willingness to cooperate derived from her interest in police science, and she later testified that the initial incident concerning the search of the envelope played no role in her readiness to cooperate, since it was not even on her mind. Finally, the initial search of the envelope was hardly flagrant and was in no way motivated by a desire to identify persons who might connect respondent with illicit

A substantially different approach from that of the court below, giving great weight to the inherent differences between the trial testimony of a third party witness and other types of evidentiary fruits, supports the conclusion that it is generally inappropriate to suppress such testimony, except perhaps in egregious cases where a flagrantly unlawful search is undertaken for the conscious purpose of discovering potential witnesses. As Chief Justice (then Judge) Burger observed in *Smith* v. *United States*, 324 F. 2d 879, 881–882 (C.A.D.C.), certiorari denied, 377 U.S. 954:

> The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to detemine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a

activities. While obviously not commendable, the search consisted of nothing more than casual inspection of an envelope lying on a counter by a policeman who was legally entitled to be where he was. Nor is there any evidence that the search was "purposeful" or its results "exploited"; Officer Biro had no previous knowledge of respondent's gambling activities, and the FBI agent who later interviewed Hennessy had no knowledge that any unlawful conduct had prompted the report that she might be able to supply useful information.

> witness from the relative immutability of inanimate evidence.[12]

Consideration of the basic purposes of the Fourth Amendment, the deterrence objectives of the exclusionary rule, and the impact on the integrity of the judicial process resulting from treating live witness testimony like other evidentiary fruits also supports a general presumption against the suppression of live-witness testimony.

A third approach is reflected in the decisions of the District of Columbia Circuit and other circuits that have applied a variety of factors on a case-by-case basis to determine whether live-witness testimony is sufficiently attenuated to purge the primary taint, but that have also recognized that live-witness testimony is, for these purposes, significantly different from other types of evidentiary fruits.

In short, whether and under what circumstances the exclusionary rule applies to the trial testimony of a

[12] The intervening circumstances of the trial itself and the witness's willingness to testify under oath and to be subject to cross-examination may also warrant a presumption that the testimony is the product of the witness's act of free will rather than of the initial misconduct. As Chief Justice Burger also observed in *Brown* v. *United States*, 375 F. 2d 310, 319 (C.A. D.C.) (concurring), certiorari denied, 388 U.S. 915:

> [L]ive witnesses are not suppressed, as inanimate objects may be. When an eyewitness is willing to give testimony under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard. How he came to be in court is a matter which goes only to the weight, not the admissibility of his testimony.

Cf. *Frisbie* v. *Collins*, 342 U.S. 519.

witness whose utility was discovered as a result of an improper search is squarely presented by the decision below, involves a conflict among the circuits, is important to law enforcement, and should be resolved by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

RICHARD A. ALLEN,
Assistant to the Solicitor General.

SIDNEY M. GLAZER,
HOWARD WEINTRAUB,
Attorneys.

FEBRUARY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLANT,

v.

RALPH CECCOLINI, DEFENDANT-APPELLEE.
No. 1125, DOCKET 76–1091.

ARGUED JUNE 8, 1976.
DECIDED SEPT. 15, 1976.

Before KAUFMAN, Chief Judge, and FEINBERG and VAN GRAAFEILAND, Circuit Judges.

FEINBERG, Circuit Judge:

This admirably argued case comes to us in an unusual procedural posture. After a non-jury trial in the United States District Court for the Southern District of New York on two counts charging perjury before a grand jury, 18 U.S.C. § 1623, Judge Lee P. Gagliardi found defendant Ralph Ceccolini not guilty on one count and guilty on the other. But the judge then immediately set aside the guilty verdict on the ground that essential testimony against defendant had to be suppressed as the fruit of an illegal search. Citing 18

U.S.C. § 3731 and 28 U.S.C. § 1291, the Government appeals and argues that the judge erred in suppressing the evidence and setting aside the verdict. Appellee Ceccolini contends that the Double Jeopardy Clause bars the Government's appeal and, even if that is not so, that the judge's ruling was correct. We reject the former contention, but agree with the latter. Therefore, we affirm.

I.

The relevant facts are as follows. In the second half of 1973, federal authorities conducted an investigation of gambling in North Tarrytown, New York. Surveillance by federal agents included various stores, including defendant Ceccolini's Sleepy Hollow Flower Shop, which were frequently visited by Francis J. Millow, a target of the investigation. In this period, the agents did not question any employee of any of these businesses. Surveillance was discontinued in December 1973.[1]

On December 18, 1974, North Tarrytown Police Officer Ronald Biro entered the flower shop merely, according to Biro, to enjoy a cigarette break. He went into the part of the shop customarily used only by employees, where he noticed on the cash register an envelope with some money sticking out. Biro picked up the

[1] Although surveillance of the stores was discontinued, on December 3, 1974, a telephone conversation between Millow and Ceccolini, implicating the latter in a betting operation, was intercepted by local police officers participating in a combined federal-state gambling investigation.

envelope, examined its contents, saw that it contained currency and policy slips, and replaced it. Lois Hennessy, an employee, was present while this was going on. Biro did not tell Miss Hennessy what he had seen in the envelope but did ask her questions about it. Miss Hennessy told Biro that Ceccolini had told her to give the envelope to someone.

Within 24 hours, Biro notified North Tarrytown detectives who, in turn, informed Lance Emory, an FBI agent who had participated in the gambling investigation. About four months later, Emory interviewed Miss Hennessy at her home for about 20–30 minutes. At the time, Emory was under the impression that Biro's activities had been entirely legal. Miss Hennessy related the events of the December 18, 1974 incident to Emory. Thereafter, defendant Ceccolini was subpoenaed before the grand jury and testified that he had never taken policy bets at his flower shop for Francis J. Millow. The following week, Miss Hennessy gave contradictory testimony before the grand jury; shortly afterwards, Ceccolini was indicted on the perjury charge now the subject of this appeal.[2]

[2] This was Count 1 of the indictment. Count 2 charged that Ceccolini had made a false statement to the grand jury when he testified that he did not know that Hank Bucci was involved in gambling operations. Judge Gagliardi found defendant not guilty on this count because

> although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt. The defense did establish the possibility that Hank Bucci, who had several previous gambling convictions, was not known by the defendant to be currently involved in gambling at the time the question was asked.

Ceccolini made several motions in preparation for trial. In July, the district judge granted various requests for discovery; the Government did not comply until the end of September, shortly before the scheduled trial date. The Government's list of witnesses included Officer Biro, and when the defense interviewed him, it learned for the first time of Biro's December 18, 1974 search. At the start of the trial, defendant orally moved to suppress testimony, including Miss Hennessy's, derived from Biro's search, but acceded to the judge's suggestion that the hearing on the motion proceed simultaneously with the non-jury trial. Thereafter, the judge heard testimony from Officer Biro, Agent Emory and others. At the close of the Government's case, defendant moved for a directed verdict, which was denied. Defendant testified in his own behalf and called other witnesses. The judge, as the trier of fact, reserved decision until after considering a memorandum of law submitted by the Government on the suppression of Miss Hennessy's testimony.

Several months later, the judge in open court pronounced the defendant guilty on Count 1 but then immediately stated his assumption that the defendant's prior motion for a directed verdict included "a motion now . . . to set aside the verdict of guilty on Count 1." Defendant's counsel quickly acquiesced, and the judge then gave an oral opinion in which he first granted the motion to suppress Miss Hennessy's testimony and then set aside the verdict for insufficient evidence. Some colloquy followed in which defense counsel said that the testimony should have been suppressed before the ver-

dict, in which event the Double Jeopardy Clause would have barred government appeal. The judge disagreed and confirmed this view in a later memorandum opinion, which stated, in relevant part:

> In light of the serious legal issues raised by the motion to suppress—particularly on the question of taint—it was this court's explicit intention that the government have the right to appeal an adverse decision on that issue. 18 U.S.C. § 3731 clearly contemplates that the government be permitted to appeal trial court rulings which do not place a defendant in double jeopardy. Here Ceccolini was found guilty on the basis of all the evidence presented to this court. His conviction was set aside because evidence adduced at trial indicated that the testimony of the government's key witness was tainted by an illegal search. The hearing on the motion to suppress was consolidated with the trial for the convenience of the court, counsel and the witnesses, without objection by Ceccolini. Furthermore in this case the issue of taint was sufficiently uncertain that had there been a jury trial, the court would have let the Hennessy testimony go to the jury and then ruled on the motion to exclude it in the event Ceccolini was convicted. Under those circumstances, the government would then have had the right to appeal this court's ruling. There is no reason why the government should be deprived of

this opportunity because the case was tried without a jury.

This appeal by the Government followed.

II.

Ceccolini renews his argument that under the circumstances of this case the Double Jeopardy Clause precludes a government appeal. He claims that the judge should have ruled on the admissibility of Miss Hennessy's testimony before deciding the ultimate issue of guilt or innocence. Had the judge done that, he would have had to acquit because the evidence was otherwise insufficient to convict, as the judge found. Since the Government could not have appealed from such a judgment, it should not be able to do so now.

The argument is correct as far as it goes but it does not go far enough. The judge could have followed the suggested procedure but it was not the only possible alternative. The judge could also have ruled on the motion to suppress prior to the start of the trial. If he had followed that course and reached the same result, the Government points out to us, it could have immediately appealed under 18 U.S.C. § 3731 to test the suppression ruling. We are aware that Ceccolini did not know until just before trial about Biro's search and his connection with the Hennessy testimony and so could not have moved sooner.[3] We also realize that such a motion would have required a separate evidentiary hearing. But in a non-jury case such potential duplica-

[3] Judge Gagliardi so found.

tion of tesitmony is often eliminated at trial, if the motion to suppress is denied, by allowing the record of the suppression hearing to be used at trial. That procedure would have been preferable to the one followed here. See *United States v. Birrell*, 470 F.2d 113, 115 (2d Cir. 1972).

In any event, we agree with the district judge and the Government that the course followed here did not deprive it of the right to appeal. The judge as trier of fact first found defendant guilty and then granted defendant's motion to set aside the guilty verdict. In *United States v. De Garces*, 518 F.2d 1156 (2d Cir. 1975), the same sequence occurred and we held, on the authority of *United States v. Jenkins*, 420 U.S. 358, 365, 368, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), that the Government could appeal. The trier of fact in *De Garces* was a jury and here it was a judge, but the distinction is not controlling. If the Government's position on the merits is correct, "a retrial would not be required." *United States v. Jenkins, supra*, 420 U.S. at 365, 95 S.Ct. at 1011, citing *United States v. Wilson*, 420 U.S. 332, 344–45, 352–53, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975). In *De Garces*, since the Government's position on the merits was correct, we merely vacated the judgment of acquittal granted by the judge after the guilty verdict and remanded the case to the district court with directions to reinstate that verdict. If the Government were correct here on the merits, we would follow the same procedure.[4] This appeal is not offensive to the Double Jeopardy Clause.

[4] Cf. *United States v. Fayer*, 523 F. 2d 661, 664 (2d Cir. 1975).

III.

We turn now to the merits of the Government's appeal. The most damning evidence on Count 1 was the testimony of Lois Hennessy that, while she was an employee at the flower shop, she saw customers place bets with Ceccolini and that she knew these bets were turned over to Millow. Although Miss Hennessy's testimony was corroborated, the judge was correct in holding that without it there was insufficient evidence to convict defendant. The more difficult issue is whether that testimony had to be suppressed as the product of Officer Biro's unlawful search.[5] The Government offers a number of reasons why suppression was inappropriate.

The Government's most substantial argument is that its investigation would have produced Lois Hennessy's testimony even if the December 18, 1974 search had never occurred. It relies upon a line of cases, exemplified by *United States v. Falley*, 489 F.2d 33, 40–41 (2d Cir. 1973), for the proposition that the taint from an unlawful search is removed if independent

[5] The Government conceded at oral argument that Officer Biro's search was illegal, although its brief does note that "there is at least some question" whether Ceccolini can complain of the "Fourth Amendment violation" because he was not present at the time and had transferred "an apparently open envelope to Miss Hennessy," who "would appear to have been authorized to permit perusal of the envelope in the manner that occurred." Brief of the United States of America, at 9*. To the extent the argument is being pressed, we reject it. The point was not raised in the trial court, there is no evidence that Miss Hennessy had authority to show it to anyone but Millow, and Biro apparently searched in the envelope without anyone's permission.

investigation would have led to the evidence in question in any event. See also, e.g., *United States v. Capra*, 501 F.2d 267, 280 n.12 (2d Cir. 1974), *cert. denied*, 420 U.S. 990, 95 S.Ct. 1424, 43 L.Ed.2d 670 (1975); *United States v. Cole*, 463 F.2d 163, 171–74 (2d Cir.), *cert. denied*, 409 U.S. 942, 93 S.Ct. 238, 34 L.Ed.2d 193 (1972). However, Judge Gagliardi was aware of this doctrine, specifically referred to the *Falley* decision twice in his oral ruling setting aside the guilty verdict, and found that:

> [T]he government has failed to show by the fair preponderance of the evidence that Lois Hennessy's knowledge of Ceccolini's gambling operations and her willingness to cooperate with the FBI was the normal output of the investigation which was in progress at the time of the illegal search. Therefore, . . . the *Falley* case . . . cannot be relied on here to purge the Hennessy testimony of the taint resulting from the illegal search on December 18th.

On this ultimate issue, the question is whether Judge Gagliardi's finding was clearly erroneous or embodied an error of law. See *United States v. Schipani*, 414 F.2d 1262, 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 902, 25 L.Ed.2d 102 (1970).

The Government presses a number of contentions on appeal that are primarily factual. Most of them were argued to the trial judge, who found as follows:

The government contends that since Lois Hennessy was employed in the shop which was already under surveillance the FBI would have inevitably discovered her existence and obtained her testimony for this trial without the illegal search.

I do not agree. Agent Lance Emory, special agent for the FBI in charge of the case, had already stated in response to a question by me that Lois Hennessy came to his attention because of the December 18th incident involving Officer Biro and because she was an employee of the shop. It is thus clear that the illegal search was at least in part the actual source of the government's information that Lois Hennessy would be an important witness about Ceccolini's gambling activities, and that prior to the search the government's attention had not focused on her in that capacity.

While certainly it is possible, perhaps even probable, that the FBI would have interviewed Miss Hennessy later in the course of the gambling investigation, I do not believe that the government has sustained its burden of proving by a fair preponderance of the credible evidence that it would have inevitably come across her in the course of its investigation.

At the time she was interviewed no other employee of Ceccolini's flower shop had been

interviewed by the FBI. While it is true that other employees were subsequently interviewed and called before the grand jury, it is not entirely clear that the investigation would have focused on the employees of the flower shop at all were it not for the illegal search and the favorable response of Lois Hennessy to the FBI interview.

Under these circumstances the government's assertion that any taint resulting from the illegal search is purged by the fact that the Hennessy testimony would have been inevitably discovered by the FBI must fail.

These findings were amply supported by the record.

The Government emphasizes to us that since surveillance of the flower shop and an intercepted telephone call both occurred prior to the illegal search, the latter did not initiate the gambling investigation that led to Ceccolini. However, the direct surveillance of the flower shop had ceased a year before Biro's search and there is no testimony that Agent Emory was aware of the recorded phone call between Ceccolini and Millow when he interviewed Miss Hennessy. Judge Gagliardi obviously felt that the illegal search triggered the phase of the investigation that focused on Ceccolini. His conclusion that the previous investigation did not purge the taint from Miss Hennessy's testimony was a justifiable one.

Citing *Wong Sun v. United States*, 371 U.S. 471, 486, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and

United States v. Brignoni-Ponce, 422 U.S. 873, 876 n.2, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Government also claims that the testimony of Lois Hennessy "was an act of free will sufficient to purge the taint of any unlawful invasion that may have occurred on December 18, 1974." [6] The Government stresses that Miss Hennessy's testimony was not coerced, that Agent Emory did not know that Biro's search had been illegal, and that Biro's conduct was hardly purposeful or flagrant. See *Brown v. Illinois*, 422 U.S. 590, 603–04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). However, we do not believe that the cited cases and the emphasized facts require us to reverse the trial judge here. Only a few months ago, we analyzed and rejected much the same arguments and affirmed a similar suppression of evidence. *United States v. Karathanos*, 531 F.2d 26, 34–35 (2d Cir.), *cert. denied*, — U.S. ——, 96 S.Ct. 3221, 49 L.Ed.2d —— (1976). See also *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964), discussed at length in *Karathanos*.[7] The Government responds that in *Karathanos* and *Tane*, the witnesses whose testimony was uncovered by the illegal search were pressured into testifying, while Miss Hennessy was not. At oral argument, Ceccolini's counsel disputed the Government's version of what occurred in this case. We need not deal with the issue at length. We doubt that this point was pressed in the district court, because

[6] Brief of the United States of America, at 8.

[7] *Karathanos* takes note of *Brown* v. *Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L.Ed. 2d 416 (1975), *Michigan* v. *Tucker*, 417 U.S. 433, 94 S. Ct. 2357, 41 L.Ed. 2d 182 (1974), and *Wong Sun*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed. 2d 441 (1963).

the judge made no specific findings regarding Lois Hennessy's state of mind.[8] But even if the argument had been made, we do not regard it as dispositive under the precedents cited above. *Cf. United States v. Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976). In any event, the road to Miss Hennessy's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted, and we would not hold her testimony admissible merely because her cooperation with the Government was not coerced.[9]

Finally, the Government argues that the rule excluding the fruit of an illegal search is inappropriate in a perjury prosecution, especially when the perjury occurred after the illegal intrusion. Citing *United States v. Raftery*, 534 F.2d 854 (9th Cir. 1976), and *United States v. Turk*, 526 F.2d 654 (5th Cir. 1976), the Government contends that suppression serves no deterrent purpose when the search precedes the crime and that perjury cannot be condoned in any event.

[8] The Government's only reference to this issue in its memorandum of law submitted to Judge Gagliardi concerning the suppression of Miss Hennessy's testimony appears in a footnote in the "Conclusion" of a 14-page memorandum.

[9] The recent decision of a panel of this court in *United States* v. *Mullens*, 536 F. 2d 997 (2d Cir. 1976), is distinguishable. The panel held that statements of a defendant, who presented himself at a police station following an illegal search of his home and the arrest of his parents, were "sufficiently a product of [the defendant's] free will to purge the taint of the earlier, illegal search. . . ." *Id.* at 1000. In *Mullens*, the defendant came forward on his own, and the question was whether his own voluntary statements could be used against him. In this case, the government agent exploited the illegally obtained information by seeking out Lois Hennessy and asking questions directly related to the illegal search.

We put to one side the Government's failure to raise this issue in the trial court, although we view that omission with somewhat more gravity than the Government apparently does. We are fully in sympathy with the Government's plea that perjury not be condoned. But we see no sufficient basis for distinguishing trials of perjury charges from trials on charges of other serious crimes to which the exclusionary rule would apply in the Government's direct case at trial. If the Government's position were accepted, then logically the exclusionary rule would also be nullified for any crime that occurred after the illegal search. Whatever may be the future of the exclusionary rule,[10] we do not understand the Government's position to be the law.[11] Moreover, this is not a case, such as *Raftery* or *Turk*, in which an immunized witness was aware of an illegal search and thereupon made use of that knowledge to perjure himself with impunity. Rather, Ceccolini had no inkling of Biro's actions, and was in fact given comforting assurances by the Government that he was not a target of the grand jury's inquiry. Finally, we disagree with the Government's contention

[10] See, e.g., Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027 (1974).

[11] In attacking "the tattered curtain of the exclusionary rule," our dissenting brother relies heavily on *Stone* v. *Powell*, — U.S. —, 96 S. Ct. 3037, 49 L.Ed. 2d —— (1976), and *United States* v. *Janis*, — U.S. —, 96 S. Ct. 3021, 49 L.Ed. 2d —— (1976). But the former opinion reaffirms the exclusionary rule in a direct criminal appeal, — U.S. at —, 96 S. Ct. 3037, which is what we have here. And the latter opinion merely refused to "extend" the exclusionary rule to a civil proceeding brought by or against the United States Government when the evidence was illegally seized by state officers.

that the exclusionary rule serves no purpose here. Thus, we hold that it was proper to suppress Miss Hennessy's testimony in this perjury prosecution.

Judgment affirmed.

VAN GRAAFEILAND, Circuit Judge (dissenting):,

"Such is the irresistible nature of truth", said Thomas Paine, "that all it asks, and all it wants, is the liberty of appearing." [1] Nowhere, I submit, is it more important that truth be given the "liberty of appearing" than in the administration of justice. Accordingly, because my brothers continue to draw the tattered curtain of the exclusionary rule ever tighter in the face of truth, I must once again record my dissent.

The Supreme Court's most recent pronouncement of the exclusionary rule is *Stone v. Powell*, — U.S. ——, 96 S.Ct. 3037, 49 L.Ed.2d ____ (1976). There the Court said at p. ——, 96 S.Ct. at 3049:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding . . . Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed

[1] Foner, The Complete Writings of Thomas Paine, 354 (1945).

> by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

In the instant case, the defendant, convicted of purjury, is set free because the testimony of a witness, given freely and without coercion, is stricken from the record. How far have we come from the ennobling statement of Benjamin Disraeli that "Justice is truth in action"? How much farther can we go before we generate the "disrespect for the law and administration of justice" which is the concern of the Supreme Court?

Our nation's highest court has firmly committed itself to the proposition that statements voluntarily offered as acts of free will may be received despite a primary taint which might otherwise have made them inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).[2] In *Michigan v. Tucker*, 417 U.S.

[2] Although the Government's trial memorandum dealt primarily with the independent source issue, it clearly advanced the possibility that "Miss Hennessy might have inculpated the defendant to the Government of her own volition." The majority correctly points out in a footnote that this argument was set forth in a footnote. However, it must be apparent to the person reading these lines that the contents of footnotes do not escape the attention of careful judges and practitioners.

433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Supreme Court held that the "fruit of the poisonous tree" doctrine did not require the exclusion of the testimony of a witness who was identified by the defendant while being interrogated without proper *Miranda* warnings. The Court said at 447–448, 94 S.Ct. at 2365:

> The statements actually made by respondent to the police, as we have observed, were excluded at trial in accordance with *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.

See also United States v. Brignoni-Ponce, 422 U.S. 873, 876 n.2, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Although this Circuit has declined to adopt a rule that the testimony of a living witness is per se admissible despite underlying taint, *United States v. Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976),[3] it has recognized

[3] There is a marked difference on this point between our holdings and those of the District of Columbia Circuit which should, perhaps, be resolved by the Supreme Court. See, *e.g.*, *Brown* v. *United States*, 126 U.S. App. D.C. 134, 375 F. 2d 310 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 915, 87 S. Ct. 2133, 18 L.Ed. 2d 1359 (1967); *Smith* v. *United States*, 117 U.S. App.

that a truly voluntary decision to speak is sufficient to break the causal chain between an illegal search and the statements made. *United States v. Mullens*, 536 F.2d 997 (2d Cir. 1976). This "attenuation-of-the-taint" doctrine is consistent with the balancing of the "public interest in determination of truth at trial" against the "incremental contribution . . . to the protection of Fourth Amendment values by application of the [exclusionary] rule". *Stone v. Powell, supra*, —— U.S. at ——, —— n.26, 96 S.Ct. at 3049 n.26.

Here the witness' "willingness to cooperate with the FBI" [4] was clearly established. The interview with

---

D.C. 1, 324 F. 2d 879 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954, 84 S. Ct. 1632, 12 L.Ed. 2d 498 (1964). In *Smith*, at 881, then Judge Burger said:

> Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, "speak for themselves." The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. (Footnotes omitted).

[4] Assuming that the quoted language from Judge Gagliardi's opinion cannot be construed to be a finding concerning the state of mind of the witness, "the trial resulted in a record

Agent Emory that led to her testimony took place fully four months after the Biro incident, in the calm atmosphere of her home and in the presence of her family. Her narration of the events of December 18 came, not in response to questions referring to that date or to Officer Biro, but rather to a general inquiry as to whether she remembered an incident in December. When asked if she would be willing to help the Government, she replied without hesitation in the affirmative, adding that she was studying police science in college and that she was interested in police work. A careful review of the trial transcript shows her to have been anything but an unwilling witness, a fact highlighted by her statements that she had placed bets with appellant, statements potentially adverse to her penal interests.

The majority appears to concede that this testimony was not coerced and that the witness was not pressured into testifying but finds this not to be dispositive of the issue before us, relying principally on *United States v. Karathanos*, 531 F.2d 26 (2d Cir.), *cert. denied*, —— U.S. ——, 96 S.Ct. 3221, 49 L.Ed.2d —— (1976) and *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964). However, in both *Karathanos* and *Tane* we carefully pointed out that the testimony precluded was coerced and not the product of an act of free will. In my view, the result reached by the majority can only be attributed to its disenchantment with the attenuation rule

---

of amply sufficient detail and depth from which the determination may be made." *Brown* v. *Illinois*, 422 U.S. 590, 604, 95 S. Ct. 2254, 2262, 45 L.Ed. 2d 416 (1975).

itself, not the application of the rule to the facts of this case. Like it or not, this rule has repeatedly been approved by the Supreme Court, and its most recent decisions, such as *Stone v. Powell, supra*, show no disposition to retreat from such approval.[5]

In *United States v. Janis*, — U.S. ——, ——, 96 S.Ct. 3021, 49 L.Ed.2d —— (1976), Mr. Justice Blackmun, speaking for the majority said:

> There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches.

When a court prohibits a willing witness from bringing the truth to light solely because she was employed at a place where a school patrol officer impulsively peeked into an open envelope in plain view before him, I think that point has been reached.

I dissent.

---

[5] In *Stone*, — U.S. at — n. 26, 96 S. Ct. 3037 n. 6. Mr. Justice Powell, citing *Brown* v. *Illinois, supra*, and *Wong Sun* v. *United States, supra*, stated that the "attenuation-of-the-taint" doctrine is consistent with the balancing approach to the exclusionary rule, the approach advocated by that Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of September one thousand nine hundred and seventy-six.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. WILFRED FEINBERG
HON. ELLSWORTH A. VANGRAAFEILAND
Circuit Judges,

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT
v. 76–1091
RALPH CECCOLINI,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk
VINCENT A. CARLIN,
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of December, one thousand nine hundred and seventy-six.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,
v. 76–1091
RALPH CECCOLINI,
DEFENDANT-APPELLEE.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Appellant, U. S. A., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is
Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge

APPENDIX D

TRANSCRIPT OF RECORD OF PROCEEDINGS
DATED FEBRUARY 10, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Cr. 519

UNITED STATES OF AMERICA,

v.

RALPH CECCOLINI, *Defendant.*

February 10, 1976
10:20 a.m.

BEFORE:

HON. LEE P. GAGLIARDI,
District Judge.

APPEARANCES:

MICHAEL ABZUG, ESQ.,
Attorney, Special Task Force.

JOEL MARTIN AURNOU, ESQ.,
Attorney for Defendant.

[2] • • •

The Court: Following is the opinion of the Court:

Defendant Ralph Ceccolini was indicted on two counts of perjury allegedly committed on May 12, 1975, in his testimony before a grand jury investigating gambling operations in Westchester County.

The defendant duly waived his right to a jury, and, in addition, did not request the facts be specially found as provided for on Rule 23(c). Nonetheless, since this case presents significant legal questions which could not be reviewed if a general finding were made, the Court feels it appropriate to set forth its findings.

On the basis of all the evidence presented before me at trial, I find the defendant Ceccolini guilty of the crime charged in Count 1, and not guilty of the crime charged in Count 2.

The defendant made a motion for a directed verdict, and I assume that would also include a motion now at this time to set aside the verdict of guilty on Count 1.

Mr. Aurnou: Yes, your Honor.

The Court: The indictment charges the defendant with committing perjury as set forth before in Count 1 in testifying that he never took policy bets [3] at his flower shop in North Tarrytown, New York, for Francis J. Millow, and that he did not know that Hank Bucci, in Count 2, was involved in gambling operations.

As set forth in my finding of guilty on Count 1, I find that contrary to his sworn grand jury testimony that the defendant Ceccolini placed and took policy bets for Millow.

This finding is based upon the testimony of Lois

Hennessy, an employee of Ceccolini's flower shop in 1974, who stated that she observed customers in the shop place policy and football bets with Ceccolini, and that she knew these bets were later turned over to Millow.

She also testified that she herself had placed football and numbers bets during the football season with Ceccolini, and that Ceccolini had discussed various aspects of his numbers operations with her.

Corroboration of her testimony was furnished by a tape recording of a wire tapped conversation between Millow and defendant in which Millow asked Ceccolini for his breakdown "day by day"; by surveillance reports of FBI agents which show that Millow entered the flower shop daily between ten and eleven, remained only a few moments; and that many people regularly entered and left the shop [4] after a few minutes without buying any merchandise; and (3) betting slips seized from Millow's home containing the notation "Chick," allegedly Ceccolini's nickname.

I consider particularly the tape of the telephone conversation between Millow and Ceccolini, which can only be reasonably interpreted to apply to a betting operation, to be significant corroborating evidence of Lois Hennessy's basic testimony.

Although the defense presented witnesses who testified that Lois Hennessy had a reputation for exaggera-

tion, in light of the strong corroborating evidence in this case I find her testimony credible.

In contrast, I find the defendant's testimony that he never collected policy bets for Millow to be unconvincing at best. Despite the many and fine character witnesses vouching for his reputation for truth and veracity, I find that his testimony on cross-examination about the telephone conversation in which he and Millow discuss the need for "day by day totals" related to only two football bets in particular strained the credulity of a reasonable person.

I believe on the basis of Lois Hennessy's testimony the defendant on Count 1 is guilty beyond a reasonable doubt.

[5] * * *

With respect to the charge Ceccolini lied when he denied that he knew Hank Bucci was involved in gambling operations, I find that although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt. The defense did establish the possibility that Hank Bucci, who had several previous gambling convictions, was not known by the defendant to be currently involved in gambling at the time the question was asked.

The difficulty with Count 1 arises from the fact that Lois Hennessy's knowledge about Ceccolini's gambling activities first came directly to the attention of the government as a result of an illegal search. The circumstances surrounding the search described by North Tarrytown Patrolman Ronald Biro at length in his testimony at trial need not be repeated here.

I previously ruled the search to be illegal, and I believe that the government tacitly agreed to this conclusion. The question which I asked counsel to address in post trial memoranda is whether that illegal search taints Lois Hennessy's testimony and requires its exclusion from the trial.

I now find that it does. This finding is based on my finding that the government has not sustained [6] its burden of showing that Lois Hennessy's testimony definitely would have been obtained without the illegal search.

The search in question here took place on December 18, 1974. At that time Ceccolini's flower shop was under surveillance by federal authorities. Patrolman Biro, who made the search, immediately made a report of it to his superiors who subsequently forwarded it to the FBI.

As a result of this search, Lois Hennessy's knowledge of Ceccolini's gambling operations came directly to the attention of the FBI, and she was shortly thereafter interviewed.

The government contends that since Lois Hennessy was employed in the shop which was already under

surveillance the FBI would have inevitably discovered her existence and obtained her testimony for this trial without the illegal search.

I do not agree. Agent Lance Emory, special agent for the FBI in charge of this case, had already stated in response to a question by me that Lois Hennessy came to his attention because of the December 18th incident involving Patrolman Biro and because she was an employee of the shop. It is thus clear that the illegal search [7] was at least in part the actual source of the government's information that Lois Hennessy would be an important witness about Ceccolini's gambling activities, and that prior to the search the government's attention had not focused on her in that capacity.

While certainly it is possible, perhaps even probable, that the FBI would have interviewed Miss Hennessy later in the course of the gambling investigation, I do not believe that the government has sustained its burden of proving by a fair preponderance of the credible evidence that it would have inevitably come across her in the course of its investigation.

At the time she was interviewed no other employee of Ceccolini's flower shop had been interviewed by the FBI. While it is true that other employees were subsequently interviewed and called before the grand jury, it is not entirely clear that the investigation would have focused on the employees of the flower shop

at all were it not for the illegal search and the favorable response of Lois Hennessy to the FBI interview.

Under these circumstances the government's assertion that any taint resulting from the illegal search is purged by the fact that the Hennessy testimony would have been inevitably discovered by the FBI must fail. [8] In order for the inevitable discovery exception to the exclusionary rule, which the government claims this Circuit has adopted in the United States v. Falley, 489 F.2d 33, to be applicable, the tainted evidence discovered must be evidence which absent the illegality would be the normal output of an ongoing lawful investigation.

Here the government has failed to show by the fair preponderance of the evidence that Lois Hennessy's knowledge of Ceccolini's gambling operations and her willingness to cooperate with the FBI was the normal output of the investigation which was in progress at the time of the illegal search. Therefore, even if the Falley case has overruled the Second Circuit's longstanding rejection of the inevitable discovery rule announced in United States v. Paroutian, 299 F.2d 486, it cannot be relied on here to purge the Hennessy testimony of the taint resulting from the illegal search on December 18th.

Since Agent Emory testified that in seeking to interview Lois Hennessy he did in fact rely at least in part on the information forwarded to him by the local au-

thorities which unbeknownst to him resulted from an illegal search, it is clear that her testimony is the fruit of that illegal search and must be suppressed.

This is not a case in which the question is [9] whether the information obtained was from the illegal activity or from some other independent legal source. Here Agent Emory admitted information obtained in the search was relied on in locating a key witness. Without that witness I find that there was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty of Count 1 charged in the indictment.

Although the corroborating evidence—particularly the wiretapped conversation—is strong when coupled with Lois Hennessy's testimony, standing by itself it is insufficient to prove Ceccolini's guilt beyond a reasonable doubt.

The foregoing constitutes the Court's findings of fact and conclusions of law.

Now, Mr. Ceccolini was released on his own recognizance.

Mr. Aurnou: He had posted, I believe, an unsecured bond.

The Court: All right. Bail is exonerated.

Mr. Aurnou: Your Honor, may I be heard briefly on a technical matter which has left me in some confusion? Perhaps your Honor would indulge me.

The Court: Yes.

Mr. Aurnou: If I understand correctly, your [10] Honor, in reaching a decision in this case, ruled on both counts prior to the time that you made your finding on the motion. Perhaps I misunderstood that.

The Court: Your motion was denied. The motion for a verdict of not guilty was denied.

Mr. Aurnou: I understand. I was talking about the motion to suppress, sir. In other words, this was an unusual case, as your Honor will recall.

The Court: Yes.

Mr. Aurnou: Only in that my client was not aware of the search until the eve of trial. And when I disclosed that matter to your Honor it was agreed that the question of the illegality of the search would be heard at the same time as the trial itself, and I think your Honor will recall we followed precisely that format.

Now, what I was inquiring into, your Honor, was I did not understand—perhaps I am just in error, and I apologize to the Court if that is so—I do not mean to be, but it was my understanding, your Honor, that the ruling on what essentially is a pretrial motion would precede the findings on Counts 1 and 2, and that the findings on Counts 1 and 2 would be based on that evidence which your Honor would not have suppressed.

[11] • • •

The difference, of course, is one of substance to my

client in terms of double jeopardy. For that reason, your Honor, and only for that reason, and respectfully, I would ask you for a clarification, if I may.

The Court: It is my recollection that during the course of the trial the government counsel conceded that the search was illegal. You weren't there, I know —or were you there?

Mr. Abzug: Yes, I was, your Honor.

The Court: Excuse me.

I thought you had conceded—

Mr. Abzug: We didn't concede it, but your Honor made a finding the search was illegal during the course of the trial.

The Court: I think that has been taken care of, Mr. Aurnou.

Mr. Aurnou: I realize it may be improper, but would you consider seeing Mr. Abzug and myself at the bench for just a moment?

The Court: No, I don't think it is necessary.

Mr. Aurnou: I am concerned only with the clarification of the order in which your Honor wishes these to be recorded, and I mean—it may be just my confusion, your Honor, as I say—if that is so I [12] apologize—but the problem I have is one of substance.

The Court: I would rather not do it right here.

Mr. Aurnou: Very well.

The Court: If you want to submit anything additional on it you are welcome to do it. As you can see, I could have rendered a general verdict.

Mr. Aurnou: I understand that, and that would have in effect had the double jeopardy effect.

The Court: No. I thought this was the appropriate way to see whether or not the determination which I had made as to the inevitable——

Mr. Aurnou: On the inevitable discovery rule, your Honor?

The Court: Yes.

Mr. Aurnou: I certainly take no quarrel with your Honor's ruling. I would only point out to you the reason for my inquiry was that the unusual procedure in this case resulted from the fact that the government did not disclose the existence of the search, and ordinarily that matter would have been covered either at a hearing just prior to the trial, as your Honor customarily would, or even prior to that, and to have the ruling on the merits—

The Court: I excluded what were the results [13] of the search. There is no doubt that I excluded the results of the search.

Mr. Aurnou: I am not very articulate this morning,

but I am suggesting if I understand your Honor correctly——

The Court: I don't think it makes any difference as to when I passed upon the exclusion of the fruits of the search because it was clearly not admissible.

Mr. Aurnou: If that was true, if Lois Hennessy's testimony was a fruit of the illegal search, as I understood your Honor to say, then the decision that your Honor would render on the first count would be precisely the decision that you read toward the end of your opinion with regard to the sufficiency of the evidence. That would provide my client with an acquittal on the merits which would not be appealable, which would be, as a matter of double jeopardy law, final.

The Court: No, I don't think this is any different from my letting it go to the jury in a jury case and then setting it aside afterwards because of the legal grounds I have set forth in here, and that is my purpose in rendering the decision the way I have.

If it had gone to the jury I would have excluded, as I did from my own consideration, the envelope [14] and the contents of the envelope, but I would have permitted Lois Hennessy to have testified and let the jury pass upon it, and if they came in with a verdict of guilty, as I would have done on the facts here, then I would have set it aside on the grounds that I have set forth here.

That is the procedure that I follow.

Mr. Aurnou: I understand exactly what your Honor is saying, and I ask you to clarify for that reason, and I am grateful you have.

My position, just so it is on the record, is if my client were entitled to have the envelope suppressed, and the testimony of Lois Hennessy, and the nature of your reason for setting aside the verdict, then he would have been entitled as a matter of law not to have had the testimony heard.

The Court: I don't see how I could have passed upon the admissibility of Lois Hennessy's testimony until I heard all the testimony at the trial. I certainly could have passed, and did pass, upon the suppression of the fruits of that illegal search by the Tarrytown authorities. If you want to submit anything further to me, you do it.

Mr. Aurnou: I appreciate that, sir.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1619

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT J. SCIOS a/k/a ROBERT SCHWARTZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(D.C. Criminal 74-373)

Argued 22 September 1975

Decided 23 August 1976

Before: ROBB and WILKEY, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: The Government appeals from an order of the District Court (Flannery, J.) of 20 May 1975, suppressing the testimony of a potential witness, Thomas Massa, Jr., at the trial of defendant-appellee Robert J. Scios, indicted for unlawful interception of wire communications, and related offenses.[1] Prior to this order the District Court had issued a memorandum opinion and order on 10 December 1974, suppressing all tangible evidence seized by the FBI and oral statements at the time of arrest of Scios on 15 February 1974.

We do not pass upon the sufficiency of the affidavit supporting the arrest warrant or the validity of the search of Scios incidental to arrest, issues on which determinations favorable to the defendant were relied upon by the trial judge in his first order of December 1974, from which no appeal was taken, and which likewise formed the basis of his later order suppressing testimony, from which this appeal is taken. We do hold that whatever taint attached to the live testimony of the potential witness Massa by reason of the illegal

---

• Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] 18 U.S.C. § 2511(1)(a); disclosure and use of such unlawfully intercepted communications, 18 U.S.C. § 2511(1)(c) and 2511(1)(d); interstate transportation of wire communication interception devices, 18 U.S.C. § 2512(1)(a).

seizure of Scios' file folder was attenuated, and thus the District Court erred in suppressing the potential witness' testimony.

I. BACKGROUND FACTS

On 29 September 1972 electronic devices were found attached to the telephone lines of a local business. After a lengthy FBI investigation, the search for the offender narrowed to the defendant Scios, and on 15 February 1974 a warrant for his arrest was obtained in the District of Columbia. Scios was arrested in his office in New York City that day. In a search purportedly incidental to arrest, an FBI agent pulled out a file folder labeled "Your Pharmacy, Inc." from a wire rack on top of a credenza three or four feet from the chair in which Scios was sitting. Among other things in the folder was a credit card charge slip from the Royal Motel in Washington, D. C., which had defendant Scios' name and the date 26 July 1972 on it. This date was embraced in the period one and a half years earlier from 19 July to 10 August 1972 during which the wiretapping offenses were alleged in the indictment to have occurred. On the itemized bill of the motel itself was written at the top only "Mr. Massa", with no address, presumably indicating who had occupied the room.

In its customary way the FBI began a follow up on all leads to be derived from the file folder. On interview the desk manager at the Royal Motel did not recall the occupant of the room on the date shown on the receipt.

Nor did the bookkeeper at the motel recall the occupant either, but inquiry revealed that there was still available the record of telephone calls made from the room. This consisted of four numbers, two local, one in New Jersey, and one in New York. Subscribers to all phones were identified, the one in New York being Thomas Massa. A grand jury subpoena for Thomas Massa was issued. The U. S. Marshal serving the subpoena discovered there were two Thomas Massas, Senior and Junior, father and son. Contact was made with Thomas Massa, Sr., and other members of the family, but Thomas Massa, Jr. was out of town, unlocatable and unavailable for several days.

After telephone calls to members of the family and to the potential witness himself, on 5 May 1974 Thomas Massa, Jr. travelled to Washington and conferred with an Assistant U. S. Attorney. The witness' position was that he would assert his privilege against self-incrimination, the prosecutor countered that a grant of immunity was in process, and asked for an off-the-record proffer, with which Massa complied by giving an outline of his prospective testimony. After going before the grand jury and asserting his privilege that day, Massa testified before the grand jury on 8 May under a grant of immunity.

In its 10 December 1974 order the trial court ruled that the affidavit was insufficient to support the arrest warrant, because there was not probable cause to believe that defendant Scios had committed the wiretapping crimes. Alternatively, the court ruled that if the affidavit in support of the arrest warrant was suffi-

cient, the search was illegal on two grounds: (1) The file folder was not in plain view; (2) It was seized from an area that was not in defendant's control at the time of arrest, and thus was not subject to search incident to arrest for the purpose of protecting the arresting officers. From this first order suppressing "tangible evidence" derived from the file folder and "oral statements" the Government did not take an appeal. In a further hearing on 7 May 1975 to clarify whether Massa would be allowed to testify, the District Court ruled that the taint from the unlawful seizure of the file folder had not been dissipated, and therefore that the witness Massa could not testify at the trial of defendant Scios.

II. THE "ATTENUATION-OF-THE-TAINT" DOCTRINE AS AN EXCEPTION TO THE EXCLUSIONARY RULE.

A.

One matter related and preliminary to our discussion of the attenuation-of-the-taint doctrine should be disposed of first. Defendant-appellee Scios contends that the court lacks jurisdiction over this appeal under 18 U.S.C. § 3731 because (1) the District Court order of 10 December 1974 covered the testimony of all live witnesses as well as tangible evidence discovered as a result of the search and seizure held to be illegal, and (2) the Government did not appeal from this first order. The Government's position is that it is appealing from the District Court order of 20 May 1975, wherein the court ruled directly on the admissibility of the witness Massa's testimony.

However, in that second order, the District Judge did say "In an opinion and order issued December 10, 1974, this court ruled that the arrest and search of defendant Scios had been illegal and granted in full the motion to suppress evidence derived from the illegal search and seizure. The Government did not appeal." Scios contends that the District Court's second order interpreted its own first order to mean that the first order also had ruled on the inadmissibility of live testimony, such as that of Massa derived from the file folder illegally seized. If that was the District Judge's intention, he did not specifically say so, and the defendant's motion did not refer to future live testimony but only to "tangible evidence" and "oral statements." We interpret "oral statements" as being like "tangible evidence," already obtained and admissible on their own, such as anything Scios may have said at the time of arrest, not the live testimony of a witness to be offered in the future. Furthermore, as will be seen from our discussion of the attenuation-of-the-taint doctrine, the District Court was in no position in December 1974 to rule on the admissibility of any witness' live testimony, because the admissibility of any evidence, which arguably was admissible under the attenuation doctrine, would necessarily rest on the individual facts of attenuation, acts of volition, etc., in regard to that particular witness.

Anticipating that the issue of live testimony might arise later, the Government had requested, in the event of a ruling unfavorable to the Government, in its supplemental pleading of 22 November 1974, a hearing

on the question of "inevitable discovery". By this we understand that the Government assumed that the issue of live witnesses' testimony would arise if the court ruled against the Government on defendant Scios' motion to suppress on the grounds of illegal search and seizure. Prior to the trial court's first opinion and order ruling on the defendant's motion to suppress, the trial court was not even aware of the content of Massa's probable testimony, nor of all of the circumstances with regard to Massa intervening between the discovery of his bare name on the motel bill and his testimony before the grand jury. It is impossible to say that the trial judge in December 1974 knew facts which were only brought out in the hearing of 7 May 1975. Hence, the trial judge not being familiar with the facts surrounding Massa's prospective testimony, which would support the Government's attenuation-of-the-taint argument, he could not have intelligently ruled either to admit or suppress it.

We thus accept the Government's position that it did not appeal the December 1974 order because this was limited to suppressing tangible evidence and oral statements already garnered, but that it did seek and obtain a hearing on live testimony of witnesses derived from the file folder, and it now appeals from the trial judge's second order suppressing the live testimony of the prospective witness Massa.

B.

If there were no exception to the "fruit of the poisonous tree" rationale, then the establishment (1) of an

illegal search and seizure, plus (2) that a piece of evidence, whether tangible or live witness testimony, was somehow derived through a chain of causation from the illegal search, would in every case be sufficient to bar the evidence. Yet the Supreme Court has consistently refused to adopt a "but for" test whereby all evidence which would not have been discovered but for the illegal search must be excluded. If the two points above were sufficient in every case to bar admissibility, there could be no attenuation-of-the-taint doctrine exception to the fruit of the poisonous tree rationale. "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)" [2] Primary taint may be purged, for example, where circumstances which disrupt the causal link [3] or make it too remote [4] have intervened between the discovery of the identity of a possible witness and the actual testimony of that witness.

As we read the decisions of the Supreme Court on

---

[2] *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).

[3] An independent act of volition may dissipate the taint. *Id.* at 491.

[4] See *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). U.S. District Judge Gesell has restated *Nardone*, quoted at *infra* 22, as holding that where "the causal connection between initial illegality and evidence is such that 'good sense' indicates it is so complicated, remote and indirect . . . no deterrence could be achieved by exclusion." *United States* v. *Alston*, 311 F. Supp. 296, 299 (D.D.C. 1970).

this point, the rationale of the attenuation-of-the-taint doctrine is that the principal purpose of the exclusionary rule ("to safeguard Fourth Amendment rights generally through its deterrent effect")[5] would not be served by the exclusion of any given evidence (whether tangible or from a live witness) because the possible effect of deterrence on law enforcement officers' conduct would be too remote, just as remote as the attenuated lengthy link-up of illegal search with the ultimate evidence offered. Because of the remoteness and attenuation of the linkage, both between the search and the evidence offered, and between the exclusion penalty and the possible deterrence of future police misconduct, it would not serve the purpose of justice to deny truth in a particular trial. The sacrifice of foregoing admittedly valid evidence is a pure sacrifice, without any advantage to the administration of justice whatsoever, if there is to be no deterrent effect on future violations. The true interest of justice requires that we accept the truth as testified to by the witness or the tangible piece of evidence, even though the origin of the evidence admittedly in the tenuously linked past was an illegal search and seizure.[6]

A series of Supreme Court decisions in recent years

---

[5] *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

[6] This is not the same as finding an "independent source" for the evidence offered by the Government. The attenuation doctrine recognizes that the proffered evidence did indirectly derive from an illegal search and seizure, but also recognizes that the linkage is too remote for the exclusionary rule to have any success in achieving its avowed purpose of deterrence or promoting judicial integrity.

has emphasized that the exclusionary rule is not to operate rigidly and automatically. As early as *Wong Sun* v. *United States*[7] the Court noted: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police."[8] Again, in *United States* v. *Calandra*,[9] Mr. Justice Powell wrote: "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally-seized evidence in all proceedings or against all persons."[10]

Even more recently, in *Brown* v. *Illinois*,[11] the Court confronted the attenuation exception to the exclusionary rule in a situation similar to that in *Wong Sun*, *supra*. While the Supreme Court held that the Illinois court erred in adopting a *per se* rule that *Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement was admissable, the Court held that "in order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires . . . that it [subsequent statement] be 'sufficiently an act of free will to purge the primary taint.' "[12] Mr. Justice Blackmun further explained: "While we therefore reject the

[7] 371 U.S. 471 (1963).

[8] *Id.* at 487 (Emphasis supplied).

[9] 414 U.S. 338 (1974).

[10] *Id.* at 348.

[11] 422 U.S. 590 (1975).

[12] *Id.* at 602.

per se rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative *per se* or 'but for' rule."[13] The Court went on to say that whether a confession is the product of a free will under *Wong Sun* must be answered on the facts in each case, and that while the *Miranda* warnings are an important factor, they are not the only factor to be considered as to whether the confession was obtained by exploitation of an illegal arrest.

The Case of Scios here does not deal with his or Massa's confession, the question of attenuation arises in regard to the testimony of the witness Massa ultimately derived from the illegal search. We cannot, therefore, have a *Miranda* warning as a possible intervening factor producing "an act of free will to purge the primary taint". However, after Mr. Justice Blackman [sic] in *Brown* v. *Illinois* had pointed out the usual inconclusiveness of the *Miranda* warning *per se*, he enumerated other factors to be considered: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant."[14] These factors cited by the Court in *Brown* are relevant to the Scios-Massa situation here, as we discuss under part C, *infra*.

Anticipating his opinion for the Court a year later in *Stone* v. *Powell*,[15] in his concurring opinion in *Brown*

[13] *Id.* at 603.

[14] *Id.* at 603–04, (footnotes omitted).

[15] 44 U.S.L.W. 5313 (6 July 1976).

Mr. Justice Powell observed, "[t]he notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." [16] And in words even more specifically applicable to the case of Scios here, he continued: "If an illegal arrest merely provides the occasion of initial contact between the police and the accused [witness here], and because of time and other intervening factors the accused's eventual statement is the product of his own reflection and free will, application of the exclusionary rule can serve little purpose: the police normally will not make an illegal arrest in the hope of eventually obtaining such a truly volunteered statement." [17]

A year later, in the most recent Supreme Court decision bearing on these issues, *Stone* v. *Powell*,[18] in the opinion for the Court Mr. Justice Powell referred to ". . . the balancing analysis applied generally in the exclusionary rule context",[19] and noted specifically "[t]he 'attenuation-of-the-taint' doctrine also is consistent with the balancing approach," citing *Brown* v. *Illinois*, *supra*, and *Wong Sun*, *supra*. *Stone* held that a state prisoner need not be granted habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial as long as the state has afforded an opportun-

[16] 422 U.S. at 609.

[17] *Id.* at 610.

[18] Note 15, *supra*.

[19] 44 U.S.L.W. 5320, note 26.

ity for a full and fair litigation of that claim. In *Stone*, the Court voiced the most valid and irrefutable criticism of the exclusionary rule: "Application of the rule thus deflects the truth-finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." [20] In deciding the specific issue of *Stone*, the Court held that "[t]he answer is to be found by weighing the utility of the exclusionary rule against the cost of extending it to collateral review of Fourth Amendment claims." [21]

C.

We think the balancing approach taken by the Supreme Court in these most recent exclusionary rule cases requires an application of the attenuation-of-the-taint doctrine in the circumstances of this illegal search and seizure followed by the ultimate discovery and proffer of the testimony of the witness Massa. In that balancing we put into the scales the relevant factors listed by the Court in *Brown*.[22]

These factors were listed by Justice Blackmun for their bearing on whether the evidence in question, here the testimony of Massa, was obtained "by exploitation" of the illegal action, here the seizure of the file

[20] *Id.* at 5320.

[21] *Id.*

[22] Text at note 14, *supra*.

folder. We have earlier noted[23] that the taint of an illegal seizure can be purged, and "exploitation" thereby avoided, if the evidence in question is obtained only after intervening circumstances, such as an act of volition by the witness. One of the key elements in determining volition is, of course, temporal proximity,[24] since, like access to counsel, this factor may be a precondition to meaningful reflection and decision. In articulating the "possible relationships" of these factors, Justice Powell, concurring,[25] suggested that the less offensive the violation of the Fourth Amendment, the less proof of volition ought to be required.[26]

[23] *Supra* at 7.

[24] See *Brown* v. *United States*, 375 F. 2d 310, 314 (D.C. Cir. 1967): "In the circumstances of the case this intervening period, with the impact upon [the challenged witness] of innumerable incidents and his mental processes of thirteen months, attenuate any taint which may have existed originally." (citation omitted).

[25] *Brown* v. *Illinois*, *supra* at 610–12.

[26] "[T]he point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of the taint." . . . "Those most readily identifiable are on the extremes: the flagrantly abusive violation of Fourth Amendment rights, on the one hand, and 'technical' Fourth Amendment violations, on the other. In my view, these extremes call for significantly different judicial responses.

"I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights." . . . "At the opposite end of the spectrum lie 'technical' violations of Fourth Amendment rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional," *Id.* at 609–11. (footnotes and paragraphing omitted.)

Where a violation of the Fourth Amendment approaches a good error, the deterrence value of exclusion of the fruits of the search, he argues, loses much of its force[27] and should be applied flexibly. We adopt this suggestion of a variable standard of proof, not repudiated by the *Brown* majority, and consider it fully consistent with the balancing calculus demonstrated by *Calandra* and *Stone*. As we will detail later,[28] the seizure of the file folder here constituted, at most, "a marginal case of law enforcement misconduct" and warrants, therefore, a less stringent showing of volition.

Turning to the first factor, temporal proximity, from the contacts with his family by the Government investigators the witness Massa learned in March or April 1974 of the Government's interest in his testimony. He journeyed to Washington and had an interview with the prosecutor on 5 May. Before his Washington trip he had conferred with a lawyer in New York and conferred with different counsel in Washington after his interview. It was on 8 May 1974 that the District Court signed immunity papers and Massa testified before the grand jury under a grant of immunity. He has yet to testify in court, and it is this testimony which is to be offered as evidence here. By comparison, in the case of Wong Sun, the Court held that in light of his release on his own recognizance and of his return voluntarily several days later to make the disputed statement, the connection between

[27] See also *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

[28] *Infra* at 19–20.

his unlawful arrest and the statement had "become so attenuated as to dissipate the taint." [29] It was that statement, or confession, already made, which the prosecution wished to produce in Wong Sun's case.

We do not think any given number of days or hours can be defined as a requisite temporal interval between arrest and confession as in *Wong Sun* and *Brown*, nor between contact with the prosecutor and informal statement, grand jury testimony, or testimony at trial as here is offered, whichever is taken as the proper measuring terminal for "temporal proximity".[30] Rather we think that what is important is an interval of time

[29] *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

[30] Where there is an illegal arrest and a subsequent confession, it is clear that the time interval to be measured is that between arrest and giving the confession, as *Wong Sun* and *Brown* both hold. Where there is an arrest accompanied by an illegal search producing evidence which much later leads to a live witness, a question arises as to the relevant time interval, i.e., from search to first statement of the witness (5 May 1974 here), to grand jury testimony (8 May), or to testimony at trial (not yet held). The confession in *Wong Sun* and *Brown* was the evidence to be offered at trial; neither the "off-the-record" statement of the witness Massa to the prosecutor nor his grand jury testimony would be available at trial except by way of impeachment, the evidence ultimately derived here from the search and the evidence which has been ordered suppressed is the prospective live testimony of the witness at a trial not yet held. Which is the terminus of the time interval by which to measure "temporal proximity"?

If it is the first statement of the witness, the intervening factors are the FBI investigation, series of contacts with the Government, and advice of New York counsel. Arguably the court's action in granting immunity would not be an intervening factor, although it is undisputed that Massa made no

during which the originator of the statement or testimony can ponder the consequences of what he does and then willingly do it. In the case at bar, Massa was informed by his family while he was in New York of the desire of the Government investigators to talk with him before there ever was any contact with him personally. As to what was desired of him, he had time to ponder the two or more telephone calls made by the prosecutor to him and his family in New York, time in which to consult a lawyer prior to his trip to Washington, and whatever time he thought he needed on the basis of his previous reflection to consider what he should tell the prosecutor and what should be his testimony after he met with the prosecutor. The first information which Massa gave the Government was an outline of what his testimony would be, but this was only after he himself had defined his position as planning to assert his privilege against self-incrimination

statement at all on 5 May 1974 until the prosecutor told him that court process to secure immunity had already been set in motion. If the grand jury testimony on 8 May is the terminus of the time interval, we have the additional intervening factors of judicial action and consultation with Washington counsel. If the testimony in court, the evidence which was actually ordered suppressed, be taken as the terminus, the witness has had an additional two and a half years for reflection, other factors to intervene, and exercise of his volition.

We do not find it necessary to decide (doubtless the Supreme Court will ultimately enlighten us), for here we find the "temporal proximity" to the earliest terminus, the first informal statement, to be so elongated as to afford sufficient opportunity for the witness' independent reflection. Finally, "temporal proximity" is but one of the three factors listed in *Brown* bearing upon the existence of an act of volition on the part of the witness.

in the grand jury and had been informed that the court would grant him immunity in order that he could testify. On that same day, since immunity had not been granted, Massa did claim his Fifth Amendment privilege before the grand jury. Three days later, after the District Court signed immunity papers, Massa did testify before the grand jury. It is the witness' live testimony in court which the prosecution now wishes to offer, which has been suppressed, and which the witness has had two and a half years to ponder, assisted by legal advice.

We think the totality of these circumstances shows a reflective man seeking advice, pondering in advance the consequences of action, exercising his free will in giving the prosecutor certain information verbally, but on the very same day declining to testify before the Grand Jury, and then later after further counsel and immunity had been secured, testifying before the Grand Jury. These are acts of volition. The testimony at trial will be "the product of a free will." [31]

To the extent that Massa's testimony may be considered not the product of his free will, but rather the product of the court's grant of immunity and order that he appear and testify, this brings us to the second of the relevant factors listed in *Brown*, the presence of intervening circumstances. With regard to the court's action as constituting intervening circumstances, we note the similarity of Massa's situation with that in *Johnson v. Louisiana*,[32] the very case cited

[31] *Brown* v. *Illinois*, 422 U.S. at 603.

[32] 406 U.S. 356 (1972).

by the Court in *Brown* as relevant to this particular factor. In *Johnson*, the appellant was arrested at his home without a warrant, booked and then submitted to a line-up. The Supreme Court, however, rejected his claim that the identification from the line-up should be excluded as the fruit of an illegal entry and arrest.[33]

In *Johnson*, Mr. Justice White pointed out that prior to the lineup Johnson was brought before a committing magistrate to advise him of his rights and to set bail. Consequently, at the time of the lineup, the detention of Johnson was under the authority of this commitment, and the lineup was conducted not by exploitation of the challanged arrest but "by means sufficiently distinguishable to be purged of the primary taint".[34] Thus, here, when Massa testified before the grand jury under a grant of immunity, he was testifying under the authority of the immunity papers signed that same day by the district judge. The grand jury testimony thus was not an exploitation of the challenged arrest but the product of the act of the district judge in granting immunity "sufficiently distinguishable to be purged of the primary taint."

It should be noted that this *Johnson* ground for at-

[33] The Court did not review the issue of the arrest itself, which had been held legal by the court below, 255 La. 314, 230 So. 2d 825 (1970), because in any event it found that the identification could not "properly be characterized as the fruit of an illegal entry and arrest." *Johnson*, *supra* at 356.

[34] *Id.* at 365, quoting *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Cf. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), where action in violation of a court order was not excused even though the statute underlying the court order may well have been unconstiutional.

tenuation appears to be a separate and distinct basis from the volition ground. The intervening circumstance of the court custody did not presumably affect Johnson's volition: He probably would have refused the line-up if given the option. This *Johnson* ground seems also to be separate from the theory, developed above, about the remoteness of the causation: the court custody followed directly upon the warrantless arrest.

The facts of Scios' case show many other circumstances intervening between the discovery of the bare inscription "Mr. Massa" on the motel charge slip in the illegally seized file folder and the informal statement to the prosecutor or the ultimate testimony of Massa before the grand jury or at the coming trial. On 15 February 1974 the name "Mr. Massa" on the motel receipt in itself conveyed absolutely nothing. It was the subsequent FBI investigation over a period of weeks, patiently following each link in the chain, which eventually brought Thomas Massa, Jr. to Washington to the U.S. courthouse on 5 and 8 May 1974. All that the FBI knew at the time of seizure was that presumably the motel bill paid by Scios had something to do with Your Pharmacy, Inc., since it was in the file folder so labeled. It was necessary for the FBI to contact the hotel manager, who had no information, then to contact the hotel bookkeeper, who likewise had no recollection of Massa. Following its usual investigative technique, the FBI did persuade the bookkeeper to locate telephone records associated with this room number on the date in question. Out of the four numbers dialed from that room a New York FBI agent

found the name of Thomas Massa as a subscriber to the New York number. On service of the subpoena by a deputy marshal it was learned that there were two Thomas Massas. The most likely prospect, Thomas Massa, Jr., was unavailable and no information was obtainable then as to his whereabouts. After the Government investigators subpoened Massa's father, spoke with his mother, and ultimately with Massa himself, Massa eventually came to Washington.

True that the illegal seizure on 15 February provided a lead (doubtless one among dozens), but many investigative steps were necessary before "Mr. Massa" was even identified, before he was located, before he was persuated to come to Washington, and only after the machinery to grant immunity had been set in motion was the prosecution able to discover whether Messa in fact had any relevant testimony to give.

We therefore conclude that all these intervening factors serve to make the causal connection so complicated and remote as to dissipate the taint. Contemplating this situation, one commentator wrote:[35]

> In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus it could not have been the motivating force behind it. It follows that the threat of exclu-

---

[35] Note, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. Pa. L. Rev. 1136, 1148–49 (1967).

sion could not possibly operate as a deterrent in that situation.

As further demonstration that the deterrent purpose of exclusion would be minimally advanced in this case, we now turn to the third factor enumerated in *Brown* v. *Illinois*, "particularly, the purpose and flagrancy of the official misconduct". In so doing, we remember to focus on "the deterrent purpose served by the exclusionary rule, consistently with the balancing analysis applied generally in the exclusionary rule context." [36] We think it virtually impossible to argue that suppression of the testimony of the witness Massa will deter similar investigative agency conduct in the future. Application of the exclusionary rule could work only harm here. The conduct of the FBI agents in making the arrest of Scios and in further investigation is hardly to be censored. At Scios' home, the agencts entered only after he had given his valid consent. Furthermore, as the trial court put it, "Scios himself chose to lead the agents to his office and the agents had no information that Scios even had an office." [37] The arresting agents found a business file folder labeled with the name of the business entity whose wiretapping they were investigating, "Your Pharmacy, Inc.", in a wire rack on a credenza three to four feet from the desk where Scios was seated when he was arrested. It was argued, and so held by the trial judge, that at the moment the agent spotted the file folder

[36] *Stone v. Powell, supra* at 5320, n. 26.

[37] Memo. Op. of 10 Dec. 1974. App. at 51 n. 8. (This opinion is unreported).

Scios had already been disarmed and an agent had placed himself between Scios and the credenza and thus was in a position to prevent any lunge for a weapon in that direction. But surely investigative agents are supposed to look around the close vicinity of the accused at the time of making an arrest. Accepting the findings of the trial judge on conflicting evidence, the file folder with a visible label "Your Pharmacy, Inc.", named in the affidavit supporting the arrest warrant, was discovered by the agent in fingering a stack of folders so that their labels could be read. If this folder had been the first in line, it would have been in "plain view" and subject to seizure.[38]

Surely this is a marginal case of law enforcement misconduct, even if it can be labeled as such. It would be difficult to hold in retrospect that the FBI agent in charge of this arrest should then and there have made the judicial decision that the file folder and its contents were out of bounds, and that the agents would open the folder at the peril of having any evidence discovered by later lengthy investigation of leads barred from admission at trial. Such a holding would not be rational, first, because it is likely to have absolutely no deterrent effect on investigative agent conduct in the future, and secondly, if it did, it would probably deter agents from acting to secure investigative leads when

[38] The "plain view" doctrine seems to be an "eyes only" matter. Here the agent used his fingers to riffle a stack of folders, and thus, according to the trial judge, sinned irremediably. What if the agent had craned his neck, or bent his knees to read the label? We do not pass on the legality of the search here.

they should act in marginal cases, all to the detriment of the interest the law abiding public has in effective law enforcement.

In considering whether exclusion would serve a "valid and useful purpose," [39] we are further guided by the increasing case law that also pivots exclusion upon the nature of police misconduct. In *Michigan* v. *Tucker*,[40] for example, police learned the name of a witness from a statement obtained without full *Miranda* warnings, although in good faith compliance with pre-*Miranda* standards.[41] Noting that the statement obtained under interrogation was excluded at trial, the Court concluded that, "[w]hatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness . . . as well." [42] And so in the case at bar: evidence taken from the search is excluded though the search itself has been conducted in a good faith manner,[43] whatever additional deterrent value would be gained by exclusion of the fruits, particularly

[39] *Michigan* v. *Tucker*, *supra* at 446.

[40] *Id.* at 435–37.

[41] The interrogation took place before the decision in *Miranda*, 384 U.S. 436 (1966), but the trial occurred afterwards, thus making *Miranda* applicable under the holding of *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

[42] *Michigan* v. *Tucker*, *supra* at 448.

[43] On the facts of this case, it would appear that the officers would be entitled to a good faith immunity from suit. *Pierson* v. *Ray*, 386 U.S. 547 (1967). See also *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

here with the long chain of causation, is not justified by the loss of this opportunity for testimony.

For reasoning parallel to *Tucker*, the nature of police misconduct has been critical in the admission of illegally seized evidence in probation and sentencing proceedings.[44] Decisions not to apply standards under the Fourth Amendment retroactively have also relied upon good faith conduct.[45] One further example will suffice. In recently allowing illegally seized evidence to be admitted in civil proceedings, the Court in *United States* v. *Janis*,[46] in stating the proposition to be resolved, included that the officers acted "in good faith reliance on a warrant that later proved to be defective." For reasons of logic and precedent, therefore, we conclude that the application of the "fruits" doctrine here would not aptly serve its deterrent rationale.

In the words of Mr. Justice Frankfurter: "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping [illegal search]and the Government's proof. As a matter of good sense, however, such connection may

[44] Compare *United States* v. *Vandemark*, 522 F.2d 1019 (9th Cir. 1975) with *Verdugo* v. *United States*, 402 F. 2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971).

[45] *United States* v. *Peltier*, 422 U.S. 531 (1975). The Court explained that, "[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542.

[46] 44 L.W. 5303 (6 July 1976).

have become so attenuated so as to dissipate the taint." [47] This is such a case.[48] The witness Thomas Massa, Jr., may testify. The order appealed from is set aside and the case is

Remanded.

---

[47] *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

[48] We note that District Judge Flannery did not have the benefit of the Supreme Court opinions in *Brown* v. *Illinois*, 422 U.S. 590 (June 1975) or *Stone* v. *Powell*, 44 L.W. 5313 (6 July 1976), *United States* v. *Janis*, 44 L.W. 5303 (6 July 1976), and other Supreme Court decisions on the exclusionary rule during the 1975–1976 term, when he ruled on 20 May 1975 barring the testimony of the witness.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1977—228-685/57

Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-1151

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1151

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

We submit this supplemental memorandum to bring to the attention of the Court a recent decision of the Seventh Circuit in *United States v. Paepke* (reproduced in an Appendix, *infra*) and the recent action of the District of Columbia Circuit granting rehearing *en banc* in *United States* v. *Scios* (the panel opinion is reproduced at Appendix E to the petition for certiorari).

In *United States* v. *Paepke*, No. 76-1203, decided February 16, 1977, the Seventh Circuit held that the exclusionary rule does not apply to bar the admission of tangible evidence, discovered as the result of an illegal search in 1971, in a federal prosecution charging the defendant with having willfully understated his gross income and having misrepresented its source in a tax return filed by the defendant in 1972. Following the reasoning of the Fifth Circuit in *United States* v. *Turk*, 526 F. 2d 654, certiorari denied, October 4, 1976, No. 75-1633, and the

Ninth Circuit in *United States* v. *Raftery*, 534 F. 2d 854, certiorari denied, October 4, 1976, No. 76-5007, the court concluded that it was clearly unforeseeable to the police officers conducting the search that the defendant would subsequently commit tax fraud, and that accordingly "any additional deterrent effect resulting from the exclusion of the evidence is outweighed by the necessity of preserving the self-reporting system of the United States tax structure" (App., *infra*, p. 18a). This decision represents an additional conflict with the decision of the Second Circuit in the instant case concerning the application of the exclusionary rule to an offense commited after the illegal search took place (see Pet. 8-12).

On March 1, 1977, the District of Columbia Circuit granted rehearing *en banc* in *United States* v. *Scios*, discussed in the Petition For Certiorari at pp. 14-15. It is our submission that the panel in that case correctly recognized that there are important differences between live witness testimony and other evidentiary fruits for purposes of the exclusionary rule and correctly decided the case before it. Whatever the District of Columbia Circuit ultimately decides *en banc* in *Scios*, however, the Second Circuit's approach to live witness testimony in the instant case continues to conflict significantly with decisions of other circuits (see Pet. 15-19 and cases there cited). Issues concerning the application of the exclusionary rule to live witness testimony continue to be of substantial importance to the administration of criminal justice and should be considered by this Court.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

DOJ-1977-03

APPENDIX

In the
United States Court of Appeals
for the Seventh Circuit

No. 76-1203

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

THOMAS A. PAEPKE,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 75-CR-62
James E. Doyle, *Judge.*

ARGUED SEPTEMBER 22, 1976—DECIDED FEBRUARY 16, 1977

Before CASTLE, *Senior Circuit Judge,* TONE, *Circuit Judge,* and KUNZIG,* *Judge.*

KUNZIG, *Judge.* This case of first impression asks the court to determine to what extent the exclusionary rule[1] prohibits the use of illegally seized evidence to prove tax

---

* Judge Robert L. Kunzig of the United States Court of Claims is sitting by designation.

[1] *See, e.g., Garner v. United States*, 96 S.Ct. 1178 (1976); *United States v. Janis*, 96 S.Ct. 3021 (1976); *Stone v. Powell*, 96 S.Ct. 3037 (1976); *United States v. Calandra*, 414 U.S. 338 (1974); *Harris v. New York*, 401 U.S. 227 (1971); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

fraud allegedly committed some months after the seizure. District Judge Doyle, in the Western District of Wisconsin, suppressed all evidence arising from an illegal seizure by county authorities. The Govermment appeals, with jurisdiction of the court based upon 18 U.S.C. § 3731 (1970).[2]

We hold the evidence to be properly admissable.

Events leading to this federal tax prosecution began with Marin County, California police arresting Arnold Paepke, defendant-appellee, at the San Francisco airport on October 26, 1971. At the time of his arrest, $12,725 was seized from him. He was picked up as a result of an earlier search of a house in Mill Valley, California. The search of that house connected Paepke with illegal drug activity.

Following the arrest, the State of California sought to prosecute Paepke for violation of narcotics laws. The charges were dropped, however, because the state court (finding the original search of the house illegal) suppressed all evidence and information obtained as a result of that search. The suppressed evidence included the $12,725 seized from Paepke.

---

[2]18 U.S.C. § 3731 provides in part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts (sic) suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

After the state charges were dropped, Paepke went back to Madison, Wisconsin. The $12,725, however, was turned over to the Internal Revenue Service which immediately terminated Paepke's tax year in October 1971,[3] assessed a deficiency of approximately $26,000 and levied upon the funds seized. In December 1971, Paepke filed in the United States Tax Court, seeking to have the money returned to him. The suit was dismissed on jurisdictional grounds.[4]

On April 3, 1972, Paepke filed an individual tax return for the taxable year ending December 31, 1971. This return, made and subscribed under the penalty of perjury, listed an adjusted gross income of $3,275, all allegedly

---

[3]The termination was pursuant to 26 U.S.C. § 6851(a)(1) which provides in part:

> In general.—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable.

[4]The petition was dismissed in August 1973. The IRS had not issued Paepke a deficiency notice. Such a notice was, at that time, a jurisdictional prerequisite to review by the Tax Court. Subsequently, the Supreme Court decided *Laing v. United States*, 423 U.S. 161 (1976). That case held it improper for the IRS not to issue a deficiency notice, thereby denying a taxpayer access to the Tax Court. 423 U.S. at 176, 183-85.

derived from "golf playing." The return noted a total tax due and owing of $234, stated that $12,725 had been seized by the IRS on October 27 (sic), 1971, and claimed a refund of $12,491. Following receipt of the return, the IRS referred the matter to its Intelligence Division.

About two years later, on January 15, 1974, Paepke submitted another refund claim to the IRS. He restated that in 1971 he had an adjusted gross income of $3,275, and a tax liability of $234. Once again he requested a refund of the difference between the $234 and the amount which had been seized in California. Obtaining no relief from this request, he next filed a civil suit for refund in the United States District Court for the Western District of Wisconsin on March 13, 1974. That suit is still pending and inactive.

The United States then filed criminal charges in the Western District of Wisconsin on August 8, 1975 (giving rise to this appeal). The indictment charged that Paepke knowingly, under penalty of perjury, understated his adjusted gross income for the year 1971 and misrepresented its source.[5] Prior to trial, Paepke moved to suppress all evidence obtained from him in the illegal search and seizure in California. U.S. District Judge Doyle agreed the evidence had been illegally seized and barred all evidence relating thereto, including documents concerning Paepke's efforts to retrieve the money, from use in the federal tax fraud trial.

---

[5]The statutory basis for the prosecution is 26 U.S.C. § 7206(1) which reads:

> Any person who—
>
> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; shall be guilty of a felony . . .

Judge Doyle's decision that the money was illegally seized in California is not now contested before the Court of Appeals. All parties agree that the initial seizure was illegal. What is at issue is that part of the Judge's order barring the Government from using any evidence relating to the $12,725 that was seized by the Marin County police. This includes:

A. *Documentary Evidence*

1. The complaint in the Tax Court suit filed in December 1971;
2. Paepke's tax return for 1971,
3. The refund claim filed with the IRS in January 1974;
4. The complaint in the civil suit for refund filed in the United States District Court for the Western District of Wisconsin in March 1974;

as well as:

B. *Evidence Concerning Possession of the Money*

1. The fact of Paepke's possession of $12,725 on October 26, 1971, at the time of seizure.[6]

The District Judge entered his suppression order on February 26, 1976. The United States filed notice of appeal the same day.

Before outlining the arguments of the parties, a brief statement of the role of the court in determining the application of the exclusionary rule might be helpful.

---

[6]The money was held by the IRS as an asset of Paepke's, that is as prepaid taxes, and was thereby also imputed to Paepke's possession on December 31, 1971.

The exclusionary rule was adopted to assure the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974). This rule precludes the use in a criminal proceeding against the victim of an illegal search and seizure of all evidence obtained, directly or indirectly, in violation of the Fourth Amendment. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960); *Weeks v. United States*, 232 U.S. 383 (1914). The "prime purpose" of the rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra, supra* at 347.

However, not all evidence which might result in some additional deterrent to improper conduct need be excluded. As recently as a few months ago, the Supreme Court spoke to this very issue:

> "[D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone v. Powell*, 96 S.Ct. 3037, 3048 (1976).

As with any remedial device, the use of the exclusionary rule should be restricted to those situations where its forward-looking objectives are thought best served. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

In determining whether the remedial objectives are served by an application of the exclusionary rule, the court must, as outlined in *Calandra*, balance the potential injury which can occur from an application of the rule against any promotion of Fourth Amendment freedoms

by deterring police misconduct. *United States v. Calandra, supra* at 354. In this instance, the potential injury is to the self-reporting system of tax collection.

Thus, we must now balance the importance of efficient tax collection against deterrence of police misconduct.

In seeking reversal of Judge Doyle's suppression order, the Government submits three principal arguments. They are: 1) The primary purpose of the exclusionary rule (deterring future illegal police actions) was substantially satisfied by the suppression of the evidence in the California narcotics prosecution; 2) Since the erring police officers could not possibly have foreseen that the improperly seized evidence would be used in a subsequent income tax prosecution, there could be in actuality, no deterrent effect, and the purpose of the exclusionary rule would be unsatisfied; and 3) Even if there were a deterrence resulting from an application of the exclusionary rule in this case, that deterrence would be minimal compared with the potentially harmful effect upon the self-reporting system of the U.S. tax structure.

The Government's second argument is two-pronged: Paepke's post-seizure admission in documents that he possessed the $12,725 on October 26, 1971, *purged* the evidence of the contamination; and, in any event, it was not predictable that Paepke would later allegedly commit another crime (false income tax return).

Paepke counters, seeking affirmance of the District Judge's order, by urging the court to accept three principal positions, each point virtually mirroring one of the Government's, in reverse: 1) The purpose of the exclusionary rule requires that *all* evidence derived from the illegal seizure in California be suppressed. Without suppression, sufficient deterrence of future police misconduct is not achieved; 2) The use to which the Government now wants to put the evidence was predictable at

the time of the seizure. As all citizens must file income tax returns, it was foreseeable that the Federal Government would seek to prosecute for any improper filing; 3) Paepke contends that to allow the Government to use the illegally seized evidence will breed disrespect for the collection methods of the IRS. This disrespect will damage a system based chiefly on voluntary cooperation by taxpayers.

We hold for the Government (plaintiff-appellant).

We conclude that the District Judge erred in suppressing the evidence offered by the United States. Two types of evidence were sought to be introduced: the documents filed by Paepke, and evidence concerning the fact of his possession of $12,725 on the day it was seized. As the factors examined in deciding that each is admissable are different, the analysis following is separated into two sections.

A. DOCUMENTARY EVIDENCE

In this section we consider whether the exclusionary rule should prevent the Government from introducing into evidence four documentary items:

1. The complaint in the Tax Court filed in December 1971;
2. Paepke's tax return for 1971;
3. The refund claim filed with the IRS in January 1974;
4. The complaint in the civil suit for refund filed in the United States District Court for the Western District of Wisconsin in March 1974.

Our focus is on the question of whether Paepke's actions in filing these documents with the Government sufficiently purged the information contained therein of contamination

resulting from the illegal seizure in California.[7] If the contamination is purged by *Paepke's own actions* and there are no strong countervailing reasons, such as deterring future police misconduct or inflicting great harm to the tax system, then the documents should be admitted. *United States v. Calandra, spura.*

The recent statements of the District of Columbia Circuit are helpful in determining the purging effect of Paepke's actions:

> . . . What is important [in deciding whether contamination has been purged] is an interval of time during which the originator of the statement or testimony can ponder the consequences of what he does and then willingly do it.
> *United States v. Scios*, No. 75-1619 (D.C. Cir. Aug. 23, 1976) Slip Op. at 15.[8]

In the instant case, Paepke had over five months to consider the consequences of failing to state the $12,725 seized in California as income on his tax return. (Assuming, *arguendo*, that it was income). We think that this is sufficient time to purge the taint from the illegal seizure.[9]

---

[7] Although Paepke does not specifically counter this argument of the Government, he does so indirectly. In addition, the District Judge held that Paepke's submissions to the Government did not sufficiently purge the evidence of the taint of illegality to allow their admission.

[8] In *Scios*, the court held that the circumstances separating a witness's voluntary testimony from the illegal seizure sufficiently purged the contamination attached to the illegal seizure to deny the application of the exclusionary rule.

[9] Paepke's income tax return was filed more than two months after the state criminal proceedings were dropped on January 28, 1972. So at the time he filed he had already realized a substantial benefit from the exclusionary rule freedom from prosecution on the state narcotics charges.

By comparison, in *Scios*, the court found a two or three month period sufficient. *United States v. Scios, supra* at 13-14. Also, the Supreme Court in *Wong Sun v. United States*, 371 U.S. 471 (1963), determined that a confession freely given just a few days after the same confession had been illegally coerced was admissable. *See also, Brown v. Illinois*, 422 U.S. 590, 604 n.11 (1975); *Nardone v. United States*, 308 U.S. 338, 341-42 (1939).

Our conclusion that Paepke's actions purged the contamination sufficiently to allow use of this evidence does not rest on the time factor alone. Paepke was assisted and advised by professional counsel. His tax returns were prepared by the same counsel who represented him before this court. As in *Scios, supra*, we think that this fact further purges any original taint. It gives a totality of circumstances which shows a man seeking advice, considering in advance the consequences of a course of action, and then voluntarily giving the Government certain information. *United States v. Scios, supra* at 16; *see United States v. Brown, supra* at 611 (Powell, J., concurring in part).

Paepke's argument, to the contrary, that the Government had not shown the contamination sufficiently purged is not convincing. He would have the court decide that, because the seized money was immediately turned over to the IRS, this prosecution was foreseeable—that he was confronted with a Hobson's choice of not filing and being prosecuted for that failure, or filing and being prosecuted for tax fraud.[10] As this prosecution was forseeable, he

[10]As authority for the point that he was faced with a Hobson's choice, Paepke relies on *Marchetti v. United States*, 390 U.S. 39 (1968). The reliance is misplaced. In *Marchetti*, the Supreme Court held that a person's assertion of the Fifth Amendment privilege against self-incrimination barred his prosecution for violating the federal wagering tax statutes because the occupational tax returns faced the taxpayer with "substantial and real hazards of [self-]incrimination." 390 U.S. at 53. The instant case involves neither the type of return nor the pervasive federal and state scheme designed to single out gamblers for prosecution found controlling in *Marchetti*. *See Garner v. United States, supra* at 1186; *Albertson v. SACB*, 382 U.S. 70, 79 (1965).

continues, the Government has the burden of showing that the evidence is purged. Paepke claims that the Government has not made this showing, and that the evidence should be excluded in order to deter future police misconduct.

However, even if the Government bears this burden, we feel it has been met. Paepke was not faced with a Hobson's choice. He could have stated the $12,725 as income, paid the proper tax, and claimed the Fifth Amendment as to its source.[11] *Garner v. United States*, 96 S.Ct. 1178, 1183-88 (1976). The existence of this choice illustrates that the local authorities, at the time of Paepke's arrest, could not have foreseen this prosecution. Therefore, no deterrent effect would be achieved by excluding the evidence.

Thus it would appear that Paepke's actions in providing the Government with documentary evidence showing that he possessed the money on the date seized purges the evidence of its original contamination.[12] But we must first

[11]Note that Paepke (defendant-appellee) still would have been due a sizeable refund.

[12]We note that the Supreme Court has consistently refused to adopt the "but for" test employed by the District Court below. If the mere fact of an illegal seizure plus a piece of evidence somehow derived through a chain of causation emanating from the illegal search, were sufficient somehow to contaminate this piece of evidence so as automatically to bar its admission, there would be no exception to the exclusionary rule whatsoever. *See Brown v. Illinois*, 422 U.S. 590, 603 (1975); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *United States v. Scios, supra*.

examine whether there are countervailing factors which should yet force us to exclude this evidence. *United States v. Calandra, supra.*

What is at issue here is the self-reporting system of taxation. Paepke would have us decude [*sic*] that to allow the Government to use the illegally seized evidence will breed disrespect for the collection methods of the IRS. *See United States v. Bisceglia,* 420 U.S. 141 (1975).

In order for the self-reporting system to function properly, there must be not just truthful reporting, but also the ability to assure truthful reporting. The ability to assure honest returns is lodged in the right of the Government to prosecute for knowing falsification on individual tax returns. As Chief Justice Burger stated in *United States v. Bisceglia*:

> [I]t would be naive to ignore the reality that some persons attempted to outwit the [tax] system . . . 420 U.S. at 145.

To prevent the Government's use of these documents would frustrate the enforcement process. To allow Paepke's position would in effect deny the existence of information freely given by him to the Government for all but refund purposes.

Paepke, however, does not rest on his "breed disrespect" argument alone. He also claims that the exclusionary rule requires that *all* evidence derived from an illegal seizure must be suppressed. We disagree. The deterrence purpose of the exclusionary rule does not require that all evidence be suppressed. It commands only that evidence which would acheive substantial deterrence be suppressed. *Stone v. Powell, supra* at 3048; *United States v. Calandra, supra* at 348.

We think the substantial deterrence required by the exclusionary rule was satisfied in this case by the suppression of the evidence in the California prosecution. As we stated above, it was not foreseeable to the local arresting officers that Paepke would, subsequent to the application of the rule in California, file an allegedly false income tax return. Any future deterrent effect realized by suppression in the instant case would be minimal at best.

In summarizing section A., the court is mindful of the all-important fact that Paepke *had a choice.* He could have listed the $12,725 as income, paid the proper tax, and claimed the Fifth Amendment as to its source. Since the exclusionary rule has never required that *all* evidence be suppressed, given the purging effect of Paepke's actions and balancing the potentially great harm to the self-reporting tax system against only a marginal deterrent result gained by excluding the evidence, we conclude that the documentary evidence should not have been suppressed by the District Court.

B. *EVIDENCE CONCERNING POSSESSION OF THE MONEY*

In this section we consider the admissability of evidence showing the fact of Paepke's possession of the $12,725 on October 26, 1971. We again employ the balancing test of *Calandra* in holding the evidence not barred by the exclusionary rule. The focus is on whether illegally seized evidence itself can be used to prove the commission of subsequent tax fraud.[13]

---

[13]It must be borne in mind throughout Section B what type of evidence the Government seeks to introduce. The United States wants to use only facts that show Paepke's possession of the money on October 26, 1971. It does not ask to be allowed to prove that Paepke was involved in possibly illegal drug traffic. Rather, the Government

Framework for analysis is provided by two recent Circuit Court decisions which allow the use of illegally seized evidence as affirmative proof of perjury committed before a grand jury—*United States v. Raftery*, 534 F. 2d 854 (9th Cir. 1976), and *United States v. Turk*, 526 F. 2d 654 (5th Cir. 1976). In both *Raftery* and *Turk*, the witnesses were aware of the illegal seizure when they testified; both knew that the evidence could not be used against them directly. Yet both lied in testifying before grand juries and were prosecuted for the subsequent crime of perjury on the basis of illegally seized evidence.

Obvious parallels exist between the crime of perjury before a grand jury and the crime of filing a false income tax return. The crime of "False declarations before grand jury or court" is delineated in 18 U.S.C. § 1623 (1970):

> (a) Whoever under oath in any proceeding before . . . any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Similarly, the tax laws provide that any person who:

> Willfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter

---

seeks to show, by application of the net worth method, that Paepke misstated his income as to source and amount. As Judge Doyle stated in his opinion, the IRS plans to marshal its evidence as to mask entirely the circumstances surrounding the arrest or the fact that the seizure occurred.

> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(1) (1970).

Both statutes concentrate on the making of false material declarations as the criminal act. Both laws provide for stiff penalties upon conviction. But most importantly, both laws require that the declarant be aware of his responsibility to tell the truth. 18 U.S.C. § 1623 does this by requiring that the testimony be given under oath. The tax law requires that the declarations be truthful, under penalty of perjury. It is this requirement of truthfulness in both statutes that brings the case now before the court with *Raftery* and *Turk*.

Raftery and *Turk* involved the affirmative use of evidence seized in violation of the Fourth Amendment in a trial for the subsequent crime of perjury. The case at bar involves the use of evidence seized in violation of the Fourth Amendment in a trial for the subsequent crime of tax avoidance. We fail to discern any substantial difference between the two situations and hold that *Raftery* and *Turk* are applicable to the case at bar. *Cf. Garner v. United States*, 96 S.Ct. 1178, 1183 (1976).

Paepke, however, contends that *Raftery* and *Turk* are different. He urges that in those cases it was not predictable that the defendants would be called to testify before grand juries. Here, to contrary, it was foreseeable that Paepke would file a tax return. As it was foreseeable, he argues, the evidence should be suppressed on the basis of the forward-looking policy of the exclusionary rule.

We have traveled the "foreseeability" road before, Section A, *supra*. Paepke had a choice which prevents this type of prosecution from being predictable. Therefore, the forward-looking policy of the exclusionary rule would not be served by suppression in this case.

Further, we think that Judge Doyle drew too narrow a rule from *Harris v. New York*, 401 U.S. 222 (1972), and *Walder v. United States*, 347 U.S. 62 (1954), in excluding this evidence. The District Judge, following *Harris*, stated that the Government could not use illegally seized evidence as affirmative evidence of guilt. (Although *Harris* would admit the evidence for impeachment purposes.)

However, the Supreme Court, before the District Judge rendered his decision, had foreshadowed a broadening of *Harris* and *Walder* when, in *Oregon v. Hass*,[14] it stated:

> [T]he shield provided by *Miranda* (*v. Arizona*, 384 U.S. 436 (1966)) is not to be perverted to a license to testify inconsistently, or even *perjuriously*, free from the risk of confrontation with prior inconsistent utterances. (emphasis supplied)
>
> *Oregon v. Hass*, 420 U.S. 714, 722 (1975).

Raftery, citing *Turk* with approval,[15] seized upon the foreshadowing and added *Hass* to *Walder* and *Harris*.

---

[14]In *Hass*, testimony freely given by a defendant after his Miranda rights were read, but before the police car in which he was riding reached the station where he was to phone a lawyer, was held admissable at trial to impeach his inconsistent statements. *Oregon v. Hass*, 420 U.S. 714 (1975); *cf United States v. Mandujano*, 96 S.Ct. 1768, 1776-77 (1976).

[15]In *Raftery*, the alleged perjury took place before a federal grand jury after the illegal seizure and suppression of evidence in the state court. *United States v. Raftery*, 534 F. 2d 854, 857-58 (9th Cir. 1976).

The result was the admission of illegally seized evidence to prove subsequently committed perjury.[16]

We agree with the Ninth Circuit's reasoning in *Raftery* and think that, absent some compelling reason, *Raftery* requires the admission in this case of evidence concerning the fact of Paepke's possession of the money. It is to an examination of these possible reasons that we now turn.

Paepke presents two further reasons for not admitting the evidence: disrespect for IRS collection methods, and his claim that the exclusionary rule requires that *all* evidence derived from an illegal seizure be suppressed. Both were refuted in Section A, *supra*. Admission will not "breed disrespect" for IRS collection methods, but suppression might irreparably damage the foundation of our tax structure—self reporting. Any marginal deterrent effect gained from exclusion is counter-balanced by the need to protect the tax system.

As to Paepke's second point, the exclusionary rule does not require the suppression of *all* evidence, *Stone v. Powell, supra* at 3048—only that evidence which will achieve substantial deterrence. That has been realized in this case by the suppression of the evidence in the California prosecution. *United States v. Raftery, supra* at 857; *see also, United States v. Janis*, 96 S.Ct. 3021, 3029-32 (1976).

---

[16]Unfortunately Judge Doyle did not have the benefit of *Turk* or *Raftery*. *Turk* was decided just a few days prior to the issuance of the District Court order in this case, while *Raftery* was not decided until two weeks later.

In summary, we conclude in Section B that evidence showing the fact of Paepke's possession of the money on the date seized should have been admitted. His alleged commission of the subsequent crime of filing a false income tax return makes this case analogous to the grand jury perjury cases of *Raftery* and *Turk*. Further, the primary purpose of the exclusionary rule was substantially satisfied by the suppression of evidence in the California narcotics prosecution. It was clearly unforeseeable to erring police officers that Paepke would later allegedly commit a separate crime. Finally, any additional deterrent effect resulting from the exclusion of the evidence is outweighed by the necessity of preserving the self-reporting system of the United States tax structure.

Accordingly, we hold both that the documents filed by Paepke to obtain return of the $12,725 and the evidence showing the fact of his possession of the money on October 26, 1971, are admissable. The order of the District Judge is vacated and the case remanded to the District Court for proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

TONE, *Circuit Judge*, concurring. While I concur in the result reached by the court, I reach that result by a narrower path and therefore separately state my views.

The defendant was not faced with the dilemma of either not filing and being prosecuted for that omission or filing and being prosecuted for tax fraud. If the seized money was 1971 income he could have included it and declined to state its source if such a statement would incriminate him. He could also, I believe, have declined to state even the amount of his income if that fact alone might have tended to incriminate him, *cf. Garner v. United States*, 96 S.Ct. 1178, 1186-1187 (1976), and *California v. Byers*, 402 U.S. 424, 439-442 (1971) (Harlan, J.,

concurring), although it is doubtful that such a possibility existed in view of the dismissal of the state charges. The one course that was not open to defendant was to make a false statement in his income tax return.

If he did make a false statement, which remains to be determined, he is in the same position as a witness who testifies falsely. Illegally obtained evidence that would not otherwise be admissible, becomes admissible for the purpose of proving the falsity of the statement under oath. *Walder v. United States*, 347 U.S. 62 (1954); *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975). The illegality of the seizure does not allow him to commit with impunity the new crime of perjury or false statement.

Because the defendant here did not have immunity when he filed his return, *United States v. Turk*, 526 F. 2d 654 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976), and *United States v. Raftery*, 534 F. 2d 854 (9th Cir. 1976), in each of which the defendant gave grand jury testimony under a grant of immunity, are not precisely in point.* These cases do, however, extend the *Walder-Harris-Hass* doctrine to a criminal prosecution for the false-statement offense.

The balancing approach required by *United States v. Calandra*, 414 U.S. 338 (1974), is consistent with this analysis. Inasmuch as "the primary, if not the sole, function of the exclusionary rule is deterrence," *United States v. Janis*, 96 S.Ct. 3021, 3033 n. 34 (1976), there is as

---

*In *Raftery* the evidence was suppressed due to a violation of a California statutory provision concerning the special requirements of nighttime searches, not the Fourth Amendment. *Raftery*, *supra*, 534 F. 2d at 855; *cf Elkins v. United States*, 364 U.S. 206, 245-249 (1960) (Frankfurther, J., dissenting).

little to be said for the need to extend that rule to the facts here as there was in *Walder*, *Harris*, or *Hass*. The rule has already had its deterrent effect when the state criminal charges resulting from the illegal search and seizure are aborted. The social value of any further deterrent effect that would result from applying the rule to bar the use of the evidence to prove the falsity of a later statement made under the penalties of perjury is so attenuated and conjectural as to be entitled to little weight. On the other side of the scale, extending the rule as defendant advocates would not only have the usual truth-suppressing effect, see *Elkins v. United States*, 364 U.S. 206, 216 (1960), but would encourage the commission of a future crime of false statement, thus converting the rule into a "personal constitutional right" of the defendant, which, *Calandra* tells us, it is not.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

FILED
AUG 5 1977
[illegible] JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1151

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

RALPH CECCOLINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1977
CERTIORARI GRANTED MAY 2, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1151

UNITED STATES OF AMERICA,

Petitioner

—v.—

RALPH CECCOLINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX[1]

	Page
Relevant Docket Entries	1
Indictment	3
Respondent's Testimony Before the Grand Jury	13
Excerpts from the Trial Transcript	21
Order Granting Certiorari	84

[1] The opinion of the court of appeals may be found in Petitioner's Appendix A, 1a-20a.

The judgment of the court of appeals may be found in Petitioner's Appendix B, 21a.

The order of the court of appeals denying rehearing *en banc* may be found in Petitioner's Appendix C, 23a.

The opinion of the district court may be found in Petitioner's Appendix D, 25a-37a.

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
6-2-75	Filed indictment and ordered sealed. B/W ordered. Gagliardi, J. B/W issued.
6-3-75	Indictment ordered unsealed. Gagliardi, J.
6-16-75	Deft. (atty. present) Pleads not guilty. Deft. continued released on $5,000. P.R.B. Case assigned to Judge Gagliardi for all purposes. Gagliardi, J.
07-23-75	Filed magistrate's orig. papers: docket entry sheet, indictment warrant, disposition sheet & appearance bond.
07-30-75	Filed deft.'s motion re: copy inspection, etc.
9-30-75	Filed Govt.'s affdvt. re: response to motion for discovery and b/p.
10-14-75	Deft.'s motion for a non-jury trial and a general verdict. Granted. Waiver signed this date. Non-jury trial begun before Judge Gagliardi.
10-15-75	Trial cont'd.
10-16-75	Trial cont'd.
10-17-75	Trial cont'd. and concluded-decision reserved. Deft. cont'd. on present bail until date of decision. Gagliardi, J.
10-15-75	Filed deft's waiver of trial by jury. Gagliardi, J.
02-13-76	Filed Govt.'s memo of law re: support assertion that the testimony of L. Hennessey is sufficiently attenuated from the primary illegality of Patrolman Ronald Biro's search on 12-18-74.
02-13-76	Filed Govt.'s memo. of law.
02-10-76	Court finds deft. guilty on count I, not guilty verdict on count 2 Count I is set aside. Bail exonerated. Gagliardi, J.

02-19-76 Filed Govt.'s notice of appeal from decisions of Judge Gagliardi setting aside verdict on count 1. Mailed copies.

03-01-76 Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.

03-23-76 Filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.

03-23-76 Filed transcript of record of proceedings, dated 10-14 thru 17-75.

04-07-76 Filed Opinion #44188—deft. Ceccolini's motion to modify this Court's decision of 2-10-75 etc. Denied. Gagliardi, J. m/n

5-5-76 [Illegible] 2-10-76.

06-24-76 Filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.

07-28-76 Filed Govt's Memorandum Of Law in support of the Govt's contention that the deft. did not have to be advised of his Sixth Amendment Right, etc.

01-28-77 Filed true copy of order of the U.S.C.A. that the judgment of the District Court is affirmed in accordance with the opinion of this Court. Clerk Judgment entered 1-31-77 mn

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

75 Crim. 519

[Filed June 2, 1975, U.S. District Court, S.D. of N.Y.]

UNITED STATES OF AMERICA

—*v.*—

RALPH CECCOLINI, DEFENDANT

INDICTMENT

COUNTS ONE AND TWO

The Grand Jury Charges:

1. On or about May 12, 1975, in the Southern District of New York, RALPH CECCOLINI, the defendant, having duly taken an oath as a witness that he would testify truthfully in a proceeding before a Grand Jury of the United States duly empaneled and sworn in the United States District Court for the Southern District of New York, and inquiring for that District into violations of federal law, unlawfully, wilfully and knowingly and contrary to said oath did make false material declarations as hereinafter set forth.

2. At the time and place aforesaid, the said Grand Jury was conducting an investigation into possible violations of United States laws prohibiting the conducting, financing, managing, supervising and directing of an illegal gambling business in violation of Title 18, United States Code, Section 1955 and conspiring to do so in violation of Title 18, United States Code, Section 371.

3. It was material to said inquiry that the Grand Jury ascertain information concerning: the extent of the defendant RALPH CECCOLINI's knowledge of, and participation in, an unlawful policy, horse, and sports gambling operation in and around North Tarrytown, Yonkers, the upper Bronx, Hastings-on-Hudson, Tuckahoe, Eastchester, and lower New Rochelle; whether the

defendant, RALPH CECCOLINI, was participating in the aforesaid gambling operation by regularly accepting and collecting policy wagers from individual bettors and transferring them to Joseph Millow at the Sleepy Hollow Flower Shop, 52 Beekman Avenue, North Tarrytown, New York; and whether the defendant, RALPH CECCOLINI, was participating in the aforesaid gambling operation by accepting and collecting football and baseball wager from individual bettors and transferring them to Hank Bucci at the Sleepy Hollow Flower Shop, 52 Beekman Avenue, North Tarrytown, New York.

4. At the time and place aforesaid, the defendant RALPH CECCOLINI, appearing as a witness under oath in a proceeding before said Grand Jury, did testify falsely with respect to the aforesaid material matters and did make the following false material declarations:

(COUNT ONE)

"Q Do you know a man by the name of Frank Millo?
A Yes, I do. I don't know him as Frank. I know him as Joseph.
Q Does Mr. Millo come into your flower shop often?
A Yes, he does.
Q For what purpose?
A Well, he comes in the store, I would say, every morning.
Q Every morning?
A Right.
Q At what time?
A Ten o'clock. Between 10:00 and 11:00, I would say.
Q Does he buy flowers every morning at 10:00 o'clock?
A No.
Q Has he ever bought flowers from you?
A Yes, he has.
Q How frequently?
A Not every day.
Q For what purpose does he come into your flower shop at 10:00 o'clock?

A Well,—how should I put it—
[3] Q Would it help you if I said that the purpose for Frank Millo coming into your flower shop is to pick up policy work?
A No.
Q That's not the purpose?
A No, it isn't.
Q What's the purpose?
A I gave him a few bets, I would say probably about three, since I know him. I have known him all his life. I know his family.
Q You bet, you bet with Mr. Millo?
A I have. I would say about three times.
Q Policy bets or horse bets?
A No, numbers.
Q Policy bets?
A Yes.
Q Three times, you said?
A Yes, I would say about three times.
Q No more than three times?
A No. I would think so.
Q In what amounts, do you recall?
A I think a dollar.
Q Did you give the money directly to him when you were making the bets.
A Yes, I did.
Q Does he make a notation on a pad?
A Yes, I think he did.
Q Have you seen that?
A No, but I know that he makes notations. They can't keep it in their head. I haven't seen that.
Q You stated that Mr. Millo comes into your flower shop every day at 10:00 o'clock.
A Between 10:00 and 11:00.
[4] Q And yet you've only placed bets with him yourself at 11:00 on three occasions?
A Right.
Q When were these three occasions?
A I don't remember.
Q In the last month?
A No.

Q Within the last two months?
A I would say before I read about it in the paper, and then I have a fiancee that doesn't like me to gamble, so I stopped.
Q Before you read about Mr. Millo's arrest in the newspaper, is that correct?
A Yes.
Q Why else would he come into your flower shop?
A I have known him all my life.
Q He just comes in to talk to you?
A Talk, sure.
Q On a regular basis at 10:00 to 11:00?
A I seen him today three times before I came here, and my store is closed. I happened to be on Beekman Avenue where I live, and I seen him, and I talked to him.
Q He comes back to talk to you every day?
A I would say.

• • • •

Q You've never left policy work in an envelope for Mr. Millo?
A No, I haven't.
Q You've never left policy work in an envelope with one of the girls with instructions to give it to Mr. Millo?
A Not that I remember, Sir.
[5] Q Directing your attention to December, 1974, have you ever left policy work in an envelope and directed your girl to give it to Mr. Millo?
A To my girlfriend?
Q To a girl working in your store?
A No.
Q Never?
A Not that I remember.
Q Would you remember something like that if you had done it?
A Oh, yes, but I just don't remember, really.
Q Have you ever left policy work on the counter of your store for Mr. Millo?
A No.

Q Have you ever left gambling work on the counter of your store for Mr. Millo?
A No.
Q Have you ever given any type of gambling work in an envelope to Mr. Millo at your store?
A Never happened.
Q That never occurred?
A No.

• • • •

Q Have you ever taken policy bets yourself?
A No, I haven't.
Q Never?
A No.

• • • •

Q Mr. Ceccolini, you stated that Joe Millo comes into your flower shop at ten to eleven every day, right?
A I would say every day. He might miss a day or two, but I would say every day.
Q On the week days or on the week ends as well, every day that it's open?
[6] A Yes, every day that it's open, I would say. I mean, I didn't see him yesterday at all. I don't think I seen him Saturday.
Q But generally he comes in at least—
A He does.
Q —for example, five times a week?
A I would say.
Q Either from ten to eleven or ten to 10:30?
A Yes, I would say.
Q How long has this been going on, years?
A I would say so. I mean, a couple of years, at least.
Q A couple of years this has been going on?
A Yes.
Q And you've stated that the only purpose of those meetings is for him just to say hello?
A Well, to come in and say what's new, talk to me, what's new.
Q He never discusses his gambling business with you?
A No, not at all.

Q And he never picks up policy work from you?
A Not at all.
Q Has he ever come in any other time besides ten to 10:30, into your flower shop?
A I was working the other day for Mother's Day, I think. It was 9:00 o'clock, he stopped by and said hello, and asked if I wanted coffee.
Q Generally it's in that particular time period?
A Right.
Q And this has been going on for two years?
A A year and a half, two years, maybe three years."

• • • •

[7] Q Don't you find it odd that he is stopping in at particular times?
A No, I don't.
Q Five days a week?
A I can name you fifty other people that come into my store every day for ten minutes.
Q For what purpose?
A To say hello, to talk to me. I'll give you the names. You want them?
Q No, I don't think we are interested in them. Are these individuals passing policy work to you?
A No.
Q Are these individuals passing policy work to you?
A No.
Q Are they placing bets with you?
A No, they are not. And a lot of them are young school kids that come into the place to say hello every noontime, 7, 8, 10 of them.
MR. ABZUG: Thank you, Mr. Ceccolini.

COUNT TWO

"Q Do you know a man by the name of Hank Bucci?
A Sure. Yes, sir, I do.
Q Do you know that Hank Bucci is working in a gambling operation at this time?
A I read the paper. I know he's been locked up a few time.
Q Apart from reading the papers, have you heard Mr. Bucci is currently operating a gambling operation?

A Have I heard that he is operating a gambling operation?
Q Yes.
A No.
Q Do you know that he is?
A No, I don't.
[8] Q Just apart from what you read in the papers, you have no knowledge that he's working in a gambling operation?
A Right.
Q Do you know what he does for a living?
A I seen a sign, and I seen him standing in front of a garage selling old furniture, and stuff like that, on Beekman Avenue, in another part of town.
Q Has anybody else ever come into your flower shop for the purpose of taking bets from you, apart from Mr. Joe Millo?
A No. Can I say something, sir?
Q What would you like to say?
A I just want to say something. You asked me questions about people knowing about things that other people do. In Tarrytown there's 4,000 people, and you can't breathe unless somebody knows what's going on.
Q You state that you know certain things. The Grand Jury wants to know how you know it.
A Oh, oh, I see.
Q So it doesn't do us any good when you say, I know something and I don't know how I know it.
A I've heard that Mr. Hank Bucci used to be in the business. I heard it in a restaurant. I couldn't tell you who told me, because I can't even remember.
Q Nobody else has come into your flower shop and taken bets from you?
A No."

5. The testimony of the defendant, RALPH CECCOLINI, set forth for the above (Counts One and Two), was, as he then and there well knew, untrue.

(Title 18, United States Code, Section 1623)

/s/ Paul J. Curran
PAUL J. CURRAN
United States Attorney

/s/ Margaret M. King
MARGARET M. KING
Forelady

Feb. 10, 1976—Court finds the deft. Guilty on count 1 and not guilty on count 2. The guilty verdict on count 1 is set aside. Bail exonerated.

Gagliardi, J.

75 Crim. 1519

[Filed June 2, 1975, U.S. District Court, S.D. of N.Y.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

RALPH CECCOLINI, DEFENDANT

INDICTMENT

75 Cr.

PAUL J. CURRAN *United States Attorney*

A TRUE BILL

/s/ Margaret M. King
MARGARET M. KING
Foreman

JUDGE GAGILARDI

Date	PROCEEDINGS
6-2-75	Indictment Ordered filed. Issuance/Bench Warrant Ordered. Gagilardi, J.
6-3-75	Indictment Ordered unsealed. Gagliardi, J.—MR
6/16/75	Deft (atty. Joseph De Salvo) present. Pleads *not* guilty. Assigned *Gagliardi, J.* for all purposes. Deft. continued release on $5000. PRB. Gagliardi, J.
Oct. 14, 1975	Deft's motion for a non-jury trial and a general verdict—*GRANTED*—Waiver signed this date —Before Gagliardi, J., non-jury trial begun.

Oct. 15, 1975 Trial continued

Oct. 16, 1975 Trial continued

Oct. 17, 1975 Trial continued and concluded—*DECISION RESERVED.* Deft cont'd on present bail until date of decision. *Gagliardi, J.*

TESTIMONY OF RESPONDENT BEFORE THE GRAND JURY

[38] RALPH CECCOLINI, called as a witness, having been duly sworn by the Forelady of the Grand Jury, testified as follows:

BY MR. ABZUG:

Q State and spell your name, please.
A C-e-c-c-o-l-i-n-i.
Q First name?
A Ralph.
Q And that's pronounced Ceccolini?
A Ceccolini, Ceccolini.
Q Where do you live, Mr. Ceccolini?
A 95 Beekman Avenue, North Tarrytown.
Q When were you born?
A May 19th, 19731.
Q Are you married?
A Divorced.
Q Any children?
A Two girls.

Q Mr. Ceccolini, you have been subpoenaed before this Grand Jury to testify in connection with certain violations of Federal Law, particularly those laws concerning gambling.

I would like to advise you at this time that you are not a target of the investigation.

Mr. Ceccolini, how are you employed?

• • • •

[40] like that.

Q This is on a part time basis?
A Yes.
Q You stated you were also a correction officer?
A Yes.
Q At what institution?
A Westchester County Jail, Valhalla, New York. I work evenings.
Q Five days a week?
A Five days a week.

Q What time do you generally open up the flower store?
A 9:00 o'clock.
Q And it closes at what time?
A Five o'clock.
Q How many rooms in the flower shop?
A I would say two, three, counting the bathroom.
Q There's a rear room?
A Yes.
Q A cutting room where you cut the flowers and arrange them?
A Keep storage, a small room.
Q Do you know a man by the name of Frank Millo?
A Yes, I do. I don't know him as Frank. I know him as Joseph.
[41] Q Does Mr. Millo come into your flower shop often?
A Yes, he does.
Q For what purpose?
A Well, he comes in the store, I would say, every morning.
Q Every morning?
A Right.
Q At what time?
A Ten o'clock. Between 10:00 and 11:00, I would say.
Q Does he buy flowers every morning at 10:00 o'clock?
A No.
Q Has he ever bought flowers from you?
A Yes, he has.
Q How frequently?
A Not every day.
Q For what purpose does he come into your flower shop at 10:00 o'clock?
A Well,—how should I put it—
Q Would it help you if I said that the purpose for Frank Millo coming into your flower shop is to pick up policy work?
A No.
Q That's not the purpose?
A No, it isn't.

[42] Q What's the purpose?
A I gave him a few bets, I would say probably about three, since I know him. I have known him all his life. I know his family.
Q You bet, you bet with Mr. Millo?
A I have. I would say about three times.
Q Policy bets or horse bets?
A No, numbers.
Q Policy bets?
A Yes.
Q Three times, you said?
A Yes, I would say about three times.
Q No more than three times?
A No. I would think so.
Q In what amounts, do you recall?
A I think a dollar.
Q Did you give the money directly to him when you were making the bets?
A Yes, I did.
Q Does he make a notation on a pad?
A Yes, I think he did.
Q Have you seen that?
A No, but I know that he makes notations. They can't keep it in their head. I haven't seen that.
[43] Q You stated that Mr. Millo comes into your flower shop every day at 10:00 o'clock?
A Between 10:00 and 11:00.
Q And yet you've only placed bets with him yourself at 11:00 on three occasions?
A Right.
Q When were these three occasions?
A I don't remember.
Q In the last month?
A No.
Q Within the last two months?
A I would say before I read about it in the paper, and then I have a fiance that doesn't like me to gamble, so I stopped.
Q Before you read about Mr. Millo's arrest in the newspaper, is that correct?
A Yes.

Q Why else would he come into your flower shop?
A I have known him all my life.
Q He just comes in to talk to you?
A Talk, sure.
Q On a regular basis at 10:00 to 11:00?
A I seen him today three times before I came here, and my store is closed. I happened to be on Beekman Avenue where [44] I live, and I seen him, and I talked to him.
Q He comes back to talk to you every day?
A I would say.
Q You never policy work for him, for example?
A No, I don't.
Q You've never left policy work in an envelope for Mr. Millo?
A No, I haven't.
Q You've never left policy work in an envelope with one of your girls with instructions to give it to Mr. Millo?
A Not that I remember, sir.
Q Directing your attention to December, 1974, have you ever left policy work in an envelope and directed your girl to give it to Mr. Millo?
A To my girlfriend?
Q To a girl working in your store?
A No.
Q Never?
A Not that I remember.
Q Would you remember something like that if you had done it?
A Oh, yes, but I just don't remember, really.
Q Have you ever left policy work on the counter of your store for Mr. Millo?
[45] A No.
Q Have you ever left gambling work on the counter of your store for Mr. Millo?
A No.
Q Have you ever given any type of gambling work in an envelope to Mr. Millo at your store?
A Never happened.
Q That never occurred?
A No.

Q Has Mr. Millo ever given you any gambling slips?
A No.
Q Do you know what Mr. Millo does for a living?
A Well, I know he used to drive a bus at one time.
Q Apart from driving a bus, do you know what he does for a living?
A No, but I read the newspapers.
Q Apart from reading in the newspapers, do you know what Mr. Millo does for a living?
A No, I don't.
Q Obviously you know that he takes bets?
A Right. Well, I mean besides that, I know he picks up bets.
Q I'm interested now in his gambling activities. You know he is a gambler because he's taken some bets from you?
[46] A Yes.
Q Do you know if he has taken any bets from other individuals?
A I can't remember. I never seen him take any from anybody.
Q Have you ever heard from anybody that Mr. Millo takes bets?
A No, not really.
Q Why did you bet with Mr. Millo? I mean, you wouldn't bet with a stranger on the street?
A He is not a stranger.
Q I wouldn't bet with one of my friends unless I knew that he was a gambler.
A I know he was a gambler. I knew he picked up bets.
Q How do you know that?
A From what people talk about. You could go down to North Tarrytown, it's a small town, 4,000 people, and ask anybody, who is taking up numbers, and they'll tell you, I think.
Q Who told you that Mr. Millo was a person to bet with, did Mr. Millo tell you himself?
A No.
Q You must have heard it from somebody?
A I can't remember. Really, I don't know who told me.

[47] Q Did Mr. Millo ever tell you that he takes gambling work?

A Has Mr. Millo ever told me he takes gambling work?

Q That's right, that he is a member of a gambling operation in North Tarrytown?

A No.

Q Has he ever told you that he works in a gambling operation which is headed by Mike Yannicelli?

A No.

Q Do you know Pete Varriano?

A Yes, I do.

Q Do you know if he works for Pete Varriano?

A I have no idea.

Q How do you know Mr. Varriano?

A I used to live on Pocantico Street, and Mr. Varriano lived about two blocks down the street all my life, until I grew up and got married. In fact, years ago he helped my brother.

Q Do you know what Mr. Varriano does for a living?

A Sure, I read the paper.

Q Apart from reading the paper?

A No. I mean, I'm a correction officer. I know he's been in jail. I've never seen him.

Q Did Mr. Millo ever tell you what he did with the [48] policy bets that you made with him?

A No, he hasn't.

Q Do you think he ran the policy operation by himself?

A As far as I know, he does.

Q You don't know that Mr. Millo ever took your policy bets to a bank, what's commonly known as a bank or wire room?

A I have no idea, no.

Q You never asked him what he would do with the bets?

A No. He wouldn't tell me, anyway.

Q You have no inkling of what happened to your policy bets after you placed them with Mr. Millo?

A No.

Q Do you know a man by the name of Hank Bucci?

A Sure. Yes, sir, I do.

Q Do you know that Hank Bucci is working in a gambling operation at this time?

A I read the paper. I know he's been locked up a few time.

Q Apart from reading the papers, have you heard Mr. Bucci is currently operating a gambling operation?

A Have I heard that he is operating a gambling operation?

Q Yes.

A No.

Q Do you know that he is?

[49] A No, I don't.

Q Just apart from what you read in the papers, you have no knowledge that he's working in a gambling operation?

A Right.

Q Do you know what he does for a living?

A I seen a sign, and I seen him standing in front of a garage selling old furniture, and stuff like that, on Beekman Avenue, in another part of town.

Q Has anybody else ever come into your flower shop for the purpose of taking bets from you, apart from Mr. Joe Millo?

A No. Can I say something, sir?

Q What would you like to say?

A I just want to say something. You asked me questions about people knowing about things that other people do. In Tarrytown there's 4,000 people, and you can't breathe unless somebody knows what's going on.

Q You state that you know certain things. The Grand Jury wants to know how you know it.

A Oh, oh, I see.

Q So it doesn't do us any good when you say, I know something and I don't know how I know it.

A I've heard that Mr. Hank Bucci used to be in the business. I heard it in a restaurant. I couldn't tell you [50] who told me, because I can't even remember.

Q Nobody else has come into your flower shop and taken bets from you?

A No.

Q Nobody else has ever picked up policy work from you in your flower shop?
A No.
Q That's never occurred, to your knowledge?
A No, not that I know about.
Q Have you ever taken policy bets yourself?
A No, I haven't.
Q Never?
A No.
MR. ABZUG: Would you please temporarily excuse the witness?
THE FORELADY: Mr. Ceccolini, you are excused, sir.
(Witness leaves Grand Jury room and returns.)

Q Mr. Ceccolini, you stated that Joe Millo comes into your flower shop at ten to eleven every day, right?
A I would say every day. He might miss a day or two, but I would say every day.
Q On the week days or on the week ends as well, every day that it's open?
A Yes, every day that it's open, I would say. I mean, [51] I didn't see him yesterday at all. I don't think I seen him Saturday.
Q But generally he comes in at least—
A He does.
Q —for example, five times a week?
A I would say.
Q Either from ten to eleven or ten to 10:30?
A Yes, I would say.
Q How long has this been going on, years?
A I would say so. I mean, a couple of years, at least.
Q A couple of years this has been going on?
A Yes.
Q And you've stated that the only purpose of those meetings is for him just to say hello?
A Well, to come in and say what's new, talk to me, what's new.
Q He never discusses his gambling business with you?
A No, not at all.

Q And he never picks up policy work from you?
A Not at all.
Q Has he ever come in any other time besides ten to 10:30, into your flower shop?
A I was working the other day for Mother's Day, I think it was 9:00 o'clock, he stopped by and said hello, and asked [52] me if I wanted coffee.
Q Generally it's in that particular time period?
A Right.
Q And this has been going on for two years?
A A year and a half, two years, maybe three years.
Q Don't you find it odd that he is stopping in at particular times?
A No, I don't.
Q Five days a week?
A I can name you fifty other people that come into my store every day for ten minutes.
Q For what purpose?
A To say hello, to talk to me. I'll give you the names. You want them?
Q No, I don't think we are interested in them. Are these individuals passing policy work to you?
A No.
Q Are these individuals passing policy work to you?
A No.
Q Are they placing bets with you?
A No, they are not. And a lot of them are young school kids that come into the place to say hello every noontime, 7, 8, 10 of them.
MR. ABZUG: Thank you, Mr. Ceccolini.
(Witness excused)

EXCERPTS FROM THE TRIAL TRANSCRIPT

• • • •

[17] MR. AURNOU: There is another problem, your Honor, which I was not aware of, and let me say, Judge, I have no objection to trying the whole case, if your Honor deems that appropriate. I simply do not want to be in the position, since you are the trier of both the

facts and the law, of not having brought this to your attention properly. I have no quarrel procedurally with the way you choose to handle it.

Now may I bring a second question or problem to your attention, sir, with regard to the witness Ronald Biro and the witness Lois Hennessey. The material which I received last night, plus the questioning of these witnesses which I personally did, establishes a problem in the area of the law of search and seizure, to wit, it is [18] my understanding that Biro will testify that he went into my client's store, in uniform, at a time when my client was not present, elected himself to go behind the counter, observed an envelope on the cash register with money in it, nothing more than that, your Honor; without anything further, he picks up the envelope, seizes it, searches it, goes into the envelope, examines it. Based upon the contents of the envelope, inquires of Lois Hennessey, and thereby the fruit of the poisoned tree.

So what we have is, (1), the illegal search, and (2), the fruits of the illegal search.

I say that they vitiate the indictment and I say that they may not be allowed to testify before your Honor in the trial in chief because the evidence is illegally obtained.

THE COURT: I really think we ought to try all of these. All that that can show is that up until this point—and frankly they didn't have to give you any of the 3500 material until the witness had testified—and that would probably excuse the making of a motion to suppress prior to trial, because the facts were not shown to you at the time. That is all. That is a legal question, and there is no reason why we can't get in, try the case, raise your objections as we proceed; why go [19] any further.

MR. ABZUG: Just a very brief response, if you will, just with respect to this.

THE COURT: I would like to put the witnesses on the stand and get the case tried, and leave your legal questions if you want, if I feel I need them, and go from there. We are trying this case by statements of counsel, and we don't try cases that way.

MR. ABZUG: I have prepared a memorandum of law, your Honor.

THE COURT: Sometimes they are helpful.

MR. ABZUG: All right, I offer them up to you.

THE COURT: They are very helpful to the Court if they are accurate, to focus on the issues involved, otherwise they are a problem.

MR. ABZUG: Does your Honor not wish to hear argument on—

THE COURT: I don't want to hear argument. Let's proceed. You make your objections as we go along, and treat it as though you had a jury in the box.

MR. ABZUG: Fine.

• • • •

[63] [DIRECT EXAMINATION OF LOIS HENNESSEY]

Q Could you tell Judge Gagliardi what happened when you came to work that day?

A I came into the shop at about nine o'clock, and went and got breakfast for Ralph and myself. Came back; we were eating it.

THE COURT: Slow down now.

MR. AURNOU: I can't hear this, Judge. Maybe it is me. I don't know where to go, over there, or what to do. I can't hear it.

THE COURT: If you feel better going over there, you are welcome to do it.

MR. ABZUG: The witness is indicating her throat is slightly congested, Judge. Would a glass of water help you, Miss Hennessey?

THE WITNESS: No.

THE COURT: You came to the store about nine o'clock in the morning, you went and got breakfast for yourself and Mr. Ceccolini?

THE WITNESS: Yes.

THE COURT: All right.

[64] A Mr. Ceccolini had told me he had to go some place that day and to come in at nine. The phone rang. It was a Bronx florist asking for our order. He gave

that order, and then he had to leave. He walked over to the cards, took one, wrote something on it, put it in an envelope and asked me to give it to Popper.

Q What did he do with the envelope, where did he place it in the flower shop, do you recall?

A He placed the envelope on the cash register.

Q Was there anybody else in the shop when the defendant told you to make sure that Popper got the envelope?

A No, there wasn't.

MR. ARMNOU: Objection. If your Honor please, he is paraphrasing the testimony incorrectly.

THE COURT: When Mr. Ceccolini talked with you with respect to Mr. Popper was there anyone else in the store?

THE WITNESS: No.

Q Could you describe what the envelope looked like?

A It was a small rectangular envelope used to put greeting cards on flowers.

Q Did it have a stamp, to your recollection?

A It had the Sleepy Hollow Flower Shop stamp on it.

[65] THE COURT: Didn't have a postage stamp on it?

THE WITNESS: No.

Q Did Mr. Ceccolini tell you what was in it?

A No, he didn't.

Q Did you ask?

A No.

Q What did the defendant do, if anything, after he told you to give the envelope to Popper?

A He gave me a few last minute orders for the store, and he left.

Q At approximately 12:30 that day did anybody come into the Sleepy Hollow Flower Shop?

A Yes.

Q Who was that?

A Patrolman Ronald Biro.

THE COURT: I couldn't hear you.

THE WITNESS: Patrolman Ronald Biro.

Q Who, if you know, was Mr. Biro working for at the time that he entered the shop?

A Village of North Tarrytown.

Q Could you tell Judge Gagliardi what happened after Mr. Biro entered the shop?

A He came in to have a cigarette because he was on the post outside the flower shop. He walked behind [66] the register, sat down, was talking to me. He looked down, he saw the envelope, picked it up, looked in the envelope, put it down, asked me who it was for. I just told him somebody was coming to pick it up.

He finished his cigarette and he left.

Q Did you tell him where you got the envelope?

A I told him that Chick had told me to give this to somebody.

Q Did you say anything to him when he picked up the envelope?

A No.

Q How long would you estimate that he examined the contents?

A A few minutes.

Q Did he say anything to you after he examined the envelope's contents?

A He just asked me who it was for.

Q What did he do with the envelope after he examined the contents?

A Put it back on the register.

Q Was the envelope that Patrolman Biro examined the same envelope that the defendant instructed you to give to Popper?

A Yes, it is.

[67] Q There is no back entrance to the Sleepy Hollow Flower Shop, for example?

A No, there isn't.

Q After Patrolman Biro left the shop, did anybody else come in?

A Yes.

Q Who was that?

A Popper.

Q How soon after Biro left did Popper come into the shop, approximately?

A Approximately an hour later.
Q What time would that be, approximately?
A Oh, anywhere between 1:15 and 1:30.
Q After he came into the shop, what happened?
A He came in and asked me where Chick was. I told him he wasn't there. I gave him the envelope. He said thank you, and he left.
Q Approximately how long was he actually in the Sleepy Hollow Flower Shop before he took the envelope and walked out?
A About a minute to two minutes, at most.
Q Was December 18 the only time that the defendant told you to give an envelope to Mr. Millow?
A No, it wasn't.
[68] Q How many other times approximately were there?
A Two or three other times.
Q Did these two or three other times occur before May 12, 1975?
A Yes.
Q How many times would you say that Joe Millow came into the shop during the 12 months that you worked there?
A Almost daily.
Q Would his daily visits occur at any customary time?
A Anywhere between 10:00 A.M. and 12:00 noon.
Q When the defendant would enter the shop who would usually be there during the time you were there?
A (No response.)
Q I am sorry, when Millow went into the shop, who would be there besides yourself?
A Ralph, Rosemarie Albanese, and a few people that come in and out.
MR. AURNOU: I am sorry, I couldn't hear after Rosemarie Albanese.
THE WITNESS: A few people come in and out, pass the time of day.
Q Was Rosemarie Albanese in the shop with you [69] every day?
A Most of the days.

Q When Millow went into the shop, woud he say anything to Chick?
A Hello, how are you doing, things like that.
Q Did you overhear these conversations?
A Yes.
Q Where were you in the Sleepy Hollow Flower Shop when you overhead these conversations?
A Sitting behind the right counter most of the time.
Q Where would Mr. Millow and Mr. Ceccolini be?
A Mr. Ceccolini would be seated on the left side of the counter, and Mr. Millow would be on the opposite side of the counter.
Q Miss Hennessey, are you familiar with the style of wagering called numbers?
A Yes, I am.
Q Would you tell Judge Gagliardi how betting a number works?
A There are three digit numbers; each number ranges from zero to 9; they are computed daily by number of races run, the horses placed.
Q And could you tell Judge Gagliardi how you became [70] so well-acquainted with this style of betting?
A Just observed.
MR. AURNOU: I couldn't hear that.
THE WITNESS: Just observed and watched.
MR. AURNOU: I still can't hear.
THE COURT: Observed it and watched.
Q Where did you make these observations?
A At the flower shop.
Q During these conversations which you overheard between Ceccolini and Millow were numbers discussed?
A A few times.
Q Well, on how many occasions?
A Are you asking were numbers placed or were they discussed?
Q How many occasions did you hear Mr. Ceccolini and Mr. Millow discuss numbers?
A Amost daily.
THE COURT: Daily?
THE WITNESS: Yes.

Q And to your personal knowledge, did Mr. Ceccolini ever place a numbers wager with Joe Millow at the Sleepy Hollow Flower Shop?

A Yes.

Q And how many times?

[71] A Almost daily.

Q Almost daily for the 12 months that you were there?

A Yes.

Q You personally observed this?

A Yes.

Q Could you describe to Judge Gagliardi how the defendant would play the numbers wager with Millow?

A Pop would come in, they would pass the time of day, and then Ralph would, you know, tell him, what numbers he wanted, Millow would then take out a pad, write down the numbers, and the amount, and Ralph's name, and then stay a few minutes and leave.

Q Where was Mr. Millow standing customarily when he would make these notations?

A In front of the counter.

Q And where would you be?

A Behind the counter.

Q How much, if you know, did Ceccolini bet on the numbers with Millow every day?

A Anywhere between a dollar and three dollars.

Q Would he bet any particular number?

A 101 and 152.

MR. AURNOU: 101 and—

[72] THE WITNESS: 152.

Q What significance if any did the number 101 have for Mr. Ceccolini?

A It is the first three digits of his license plate on his stationwagon.

MR. ABZUG: Your Honor, at this time I would like to read a stipulation concluded between Mr. Aurnou and myself, into the record. "It is hereby stipulated and agreed by and between the United States of America for the Southern District of New York, by Michael Abzug, Special Attorney for the Department of Justice, and the defendant Ralph Ceccolini, by his attorney, Joel Aurnou, that since March 1, 1973, to the present date, Ralph

Ceccolini has owned a 1969 Ford bearing New York license plate number 101TAB."

MR. AURNOU: So stipulated.

However, at the time I agreed to that stipulation, your Honor, there was a second portion to it, namely that the shield that the defendant has—

MR. ABZUG: Objection, your Honor.

MR. AURNOU: —from the Department of Correction.

May I finish my statement?

MR. ABZUG: What is the relevancy? If you want to bring this in, bring it in your own case.

[73] MR. AURNOU: Very well, your Honor.

Q Now besides number 152 and 101, would the defendant bet any other number?

A Once in a while, you know, I'd say, you know, I got a number, do you want to bet it or something?

Q What numbers would you suggest to the defendant?

A 095 or 341.

Q What significance, if any, did 095 and 341 have to you?

A 095 is my mom's good luck number and 341 is the bill I always get when I am in a restaurant.

MR. AURNOU: I am sorry.

THE COURT: You are talking too fast. I think it is much too fast.

MR. AURNOU: I can't hear.

Q 095.

MR. AURNOU: Could the reporter read it?

(Record read.)

Q Did you ever see money change hands between Millow and the defendant?

A Yes, I have.

Q How many times during the 12 months you were there?

A Quite a few.

[74] THE COURT: What is quite a few?

THE WITNESS: Well, depending on, well, Ralph had the money on it; while he placed the bet he'd give it to Poppa then, and if he didn't have it, he'd wait till Saturday.

• • • •

[80] Q Did you ever overhear Millow or the man known to you as Millow and Mr. Ceccolini discuss football?

A Yes.

Q Where did you overhear these discussions?

A In the flower shop.

Q When?

A On Saturday mornings.

Q Which Saturday mornings?

A Saturday mornings during football season.

Q Which football seasons?

A Saturdays, the '73, '74 season, '74, '75.

Q In what context were they discussing football?

THE COURT: Describe the conversation that you heard; if you can place the time of it, fine, a specific conversation or what.

THE WITNESS: Poppa would come in about 10:00, and they would talk about teams and how they looked, and who was playing, and what lineups, and they would discuss point spreads.

[81] Q Did you ever personally observe Ceccolini accept a football wager from other individuals at the Sleepy Hollow Flower Shop?

A Yes.

Q How many times did you witness this?

A Almost every Saturday.

MR. AURNOU: Sorry?

THE WITNESS: Almost every Saturday the football season was on.

Q Which football seasons?

A The '73, '74 and '74-'75.

Q Could you describe to Judge Gagliardi how these people would make a football wager with the defendant?

A Well, they would play on the football tickets, and they would come in, ask him for one, he would give it to them, they would circle whatever team they wanted, they would rip off half, keep half as a receipt and give Chick the other half with the amount of money.

Q Could you describe what—

MR. AURNOU: Could I have the last part of that answer read back?

(Answer read.)

Q Could you describe what these football tickets looked like to Judge Gagliardi?

[82] A They are pastel colored, they come in two halves, they are rectangular, and they have the listing of all the college and professional teams that are playing, and beside the favorites there is plus and a point spread, and you circle whatever one you want, what team you think will do it, rip it off and give it to Ralph.

Q How many people would bet with Mr. Ceccolini every Saturday morning during football season, approximately?

A Anywhere between five and ten people.

Q Between five and ten people would bet with Cecolini every Saturday morning during football season for two years?

Q Do you know who some of these people were?

A Myself, my brother, and a few other people.

Q And what, if you know, would Ceccolini do with these five or ten football tickets that he would accept every Saturday?

A He would give them to Popper.

Q Would Popper come into the Sleepy Hollow Flower Shop? Where would he give them to Popper?

A In the shop.

Q On what day?

A On Saturday.

Q Would Popper just come in on Saturday once a day?

[83] A He'd come in twice.

Q And what would the first time be?

A Just to talk about football spread and what not.

Q And the second time?

A He'd pick up the tickets.

Q Would money change hands when the defendant gave these five or ten football wagers to Mr. Millow?

A Yes.

Q Where, if you know, did Mr. Ceccolini keep the football tickets that he deposited every Saturday?

A Most of the time they were underneath the wax paper under the right side counter.

Q Did you ever overhear a man known to you as Popper give Ceccolini a telephone number?
A Yes.
Q Where did this occur?
A At the flower shop.
Q Approximately when?
A It was during the football season.
Q What did Mr. Ceccolini do, if you know, after he received the telephone number from Mr. Millow?
A He went in the back and he dialed a number, and he came back out and he had a sheet of paper with teams and point spreads.
[84] Q How did the teams and point spreads appear on the sheet of paper?
A It was just written, say the Giants are playing Buffalo, say Giants, Buffalo, and there would be a point spread.
Q How many times did you observe Mr. Ceccolini examining point spreads after making one of these telephone calls?
A Whenever he called, I guess.
Q How many times is that?
A Saturdays and Sundays.
Q During when?
A Football season.
Q Were you able to overhear any of these conversations?
A No.
Q Where is the telephone located?
A The telephone he used was the one that was in the back, just in front of the bathroom.
Q How far away from him were you when Mr. Ceccolini would make these calls?
A Say about 15, 20 yards.
Q How long would the call last?
A Few minutes.
[85] Q What tone of vice would Mr. Ceccolini use?
A A low voice.
Q Did there come a time when Millow gave the defendant another telephone number to call?
A Yes.
Q When did this happen?

A It was approximately the same time that all the people were getting busted for gambling.
Q Aside from accepting football wagers every Saturday during two years of football season, did you ever observe the defendant accept any other types of wagers at the Sleepy Hollow Flower Shop?
A Yes.
Q Could you tell Judge Gagliardi what other types of wagers he used to accept?
A He accepted the Kentucky Derby wagers.
Q How would he accept Kentucky Derby wagers?
A People would come in and ask him to play two or three dollars on a horse.
Q When was this?
A The day of the Kentucky Derby.
Q Did Mr. Ceccolini ever accept policy wagers over the telephone?
A I think so.

• • • •

[97] [CROSS EXAMINATION OF LOIS HENNESSEY]

Q Now you told us at some point about the layout of the store. As you come into that store, you come, do you not, toward a counter, which, as you said, bisects the store?
A It is bisected is what I said, the counter.
Q What you mean is it runs from one side to the center and from the other side to the center, with a very narrow passage in between that the employees can walk through?
A Right.
Q Would it be fair to say, Lois, that the counter that we have just described separates the public area of the store from the area that the employees use?
A Yes.
Q The cash register, for example, is some distance behind and into the employee area of the store from the counter, is that correct?

[98] MR. ABZUG: Objection to the characterization, some distance behind, your Honor. Let him ask how far.

THE COURT: I will permit it.

A The cash register is seated on a table right behind the left counter.

Q When you say "right behind," what distance are you talking about in feet, Lois?

A It is not in feet. It is practically in inches.

Q How wide is the counter, Lois?

A The counter? I'd say about two to three feet long—wide.

Q Okay. And at the back edge of the counter, say three feet from the public area of the store, is the edge of the cash register which runs another foot and a half, two feet, towards the back of the store, is that correct?

A Yes.

Q And to get to the cash register, you have to go through that narrow opening into the employee area of the store, right?

A Yes.

Q And on December 18, 1974, that is exactly what Patrolman Biro did, is it not?

A Yes.

Q By the way, you told us that when Biro came [99] into the store, the florist shop, Mr. Ceccolini was not there.

A Right.

Q Do you know what time he had left the place?

A It was somewhere between 10:00 and 10:30.

Q Do you know where he went?

A I don't remember.

Q Was he working that day?

A I don't remember.

Q You don't?

A He asked me to come in early because he had to go somewhere and I came in early.

Q You testified about events of that day. Do you remember whether he was there in the afternoon or whether he went to work in the afternoon?

A I believe he returned.

Q And spent the entire balance of the day at the store?

A Yes.

Q So it is your testimony that he wasn't working that day?

A Yes.

Q Some time after Biro came in, he went over to the cash register and picked up an envelope that was there, [100] is that correct?

A He was sitting in the seat next to the register.

Q All right. He went to the seat next to the register and then picked up an envelope which was sitting on the cash register drawer?

A Right.

Q Would you describe that envelope in terms of size and in terms of use. What is it normally used for?

A It is normally used to send out greeting cards with flowers.

Q When you say greeting cards, Lois, do you mean the little card that you send along with a bouquet of flowers that would be maybe three inches by one and half inches?

A Yes.

Q And the envelope is approximately the same size?

A Yes.

Q What color is the envelope?

A White.

Q I think you said on direct testimony it bore an imprint?

A Yes.

Q Would you describe that imprint for his Honor?

A The imprint is Sleepy Hollow Flower Shop, and [101] gives the address of the shop, and it is usually located on the upper left of the envelope.

Q Is that something that was printed on there, or put on by stamp or by hand?

A Stamped.

Q Rubber stamped?

A Yes.

Q And this particular envelope had it on, did it not?

A I am pretty sure it did.

Q What can you tell us about the envelope before Patrolman Biro picked it up?
A It was sitting on the register.
Q Was the gummed side flap open or closed?
A I really don't remember.
Q Was anything protruding from the envelope?
A I wasn't paying that much attention to the envelope. I couldn't tell you.
Q Then is it fair to say that you didn't notice anything protruding from it?
A Yes.
Q Did there come a time when Biro picked up and opened the envelope?
A Yes.
[102] Q You saw him do that?
A Yes.
Q Prior to that time that he actually picked it up and opened the envelope, he said nothing to you about it, correct?
A No.
Q Sorry?
A That's correct, yes.
Q And you saw him as you were there examining the contents of the envelope, right?
A Yes.
Q I mean you actually saw him reach over, open it up and look?
A I wasn't paying that much attention to him because I was reading the paper.
Q He did it while you were reading the paper. After he had done it, it came to your attention that in fact that was what he had done?
A Yes.
Q At that point, as a matter of fact, Lois, what brought it to your attention was that he asked you some questions about it?
A Yes.
Q Isn't that fair?
[103] A Yes.
Q And the questions that he asked you had to do with whose it was, what it was doing there, is that fair?
A Yeah.

Q And you made certain answers to those questions, did you not?
A Yes.
Q You told him, among other things, that it was Mr. Ceccolini's, that it was left there for someone?
A Yes.
Q He didn't ask you who the someone was, did he?
A No.
Q He put the contents back into the envelope, and put the envelope back on the cash register, is that correct?
A That is true.
Q And then he went back out of the store, did he not?
A Yes.
Q By the way, correct me if I am wrong, but that occurred at about half-past 12:00, just after noon, is that correct?
A Yes.
Q And about 1:15 or 1:30, along came the man you described as Popper, Mr. Millow?
[104] A Yes.
Q And at that time you said you gave the envelope to him or he took the envelope, one or the other?
A I gave him the envelope.

• • • •

[108] Q Let me ask it now, Lois, how did the police discover that you had information concerning this case?
MR. ABZUG: Objection, your Honor. I believe the Court has already made a ruling.
THE COURT: Have you any knowledge how that happened?
THE WITNESS: No.
Q Let me ask it another way, Lois. Did anybody ever discuss this case or Mr. Ceccolini or the subject of numbers, policies, sports betting or anything else with you from the Police Department prior to the time that Officer Biro questioned you in Mr. Ceccolini's store on December 18?
MR. ABZUG: Objection as to relevancy, your Honor.
THE COURT: When was the first time you were interrogated with respect to what you knew about this matter?

THE WITNESS: I don't have the exact date.
THE COURT: Approximately.
THE WITNESS: Oh, April, somewhere around in there, March, April, '75.
THE COURT: March or April of '75. All right. [109] Next question.
Q By whom were you interrogated at that time?
A Mr. Emory.
Q I am sorry?
A Mr. Emory.
Q The FBI agent sitting here in the courtroom?
A Yes.
Q And did he tell you how he came to inquire of you?
A He—
MR. ABZUG: Objection as to hearsay, your Honor.
THE COURT: No, I will permit it.
A He just appeared at my door one night and asked me if I would answer a few questions for him.
Q Did he ask you questions about the incident of December 18?
A He didn't give any specific date.
Q Did he ask you questions about the incident when Patrolman Biro came into the store?
A He didn't, you know, he just said you were employed there, and asked me a few questions.
MR. AURNOU: I can't hear a word that young lady said.
[110] THE COURT: I can't hear you. We have got some low-flying aircraft here.
MR. AURNOU: Could I ask that that be read back?
THE COURT: You want the question?
MR. AURNOU: I want the answer.

(Record read.)

THE COURT: Is that your answer?
THE WITNESS: Yes.
Q Before I ask you, did he make some notes while he was talking to you, what you were saying to him?
A Yes, he did.
MR. AURNOU: Mr. Abzug, would you be kind enough to furnish me with those?

MR. ABZUG: Your Honor, as I have indicated before—
THE COURT: They also were destroyed when they were incorporated in the file report, is that correct?
MR. AURNOU: I don't have any file report, your Honor, which contains this witness' statements to Agent Emory. That was not turned over to me.
THE COURT: You don't have any written statements from her, do you?
MR. ABZUG: No, your Honor. I do not. Not [111] with respect to the incident that the counsel is interrogating the witness on. As I mentioned before, we turned over all the relevant 3500 material.
MR. AURNOU: Your Honor, I don't understand that representation. If the Government has Agent Emory's material with this young lady's statements in it from that date, I believe I am entitled to it.
THE COURT: Do you have the substance of any conversation on that date?
MR. ABZUG: Your Honor, I believe that the only thing that was discussed between Special Agent Emory and Miss Hennessey—
THE COURT: Do you have any verbatim or substance of any statements with respect to that particular interview?
MR. ABZUG: No, your Honor.
THE COURT: Very well.
Q At any time on that date, did you discuss with Agent Emory how he happened to be interviewing you?
A He said he had—
Q Please speak loudly.
A He said he had gotten information from the North Tarrytown police.
Q And did he tell you that the North Tarrytown police department had given him the information concerning [112] the event that transpired on December 18, 1974?
A He didn't say anything to that effect.
Q He wasn't that specific?
A No, he wasn't.

MR. AURNOU: Your Honor, at this time may I request through the Court that Mr. Abzug furnish me with the date on which that interview that the witness said occurred—

MR. ABZUG: I can check my appointment book in the office.

It is my understanding no official memorandum was made of this, except perhaps with sole exception of Agent Emory's appointment book which is back at the office, which is, of course, not 3500 material.

MR. AURNOU: The problem that I have, your Honor—

THE COURT: Can you give him an approximate time at which that interview was conducted?

MR. EMORY: I would say April.

THE COURT: Is that satisfactory at this time, to be confirmed later?

MR. AURNOU: I would ask that it be testified later because it presents evidence on two points that I have.

THE COURT: It will be testified later.

Q On this particular occasion, I think you told [113] us, Lois, that there was no one in the store except yourself when Officer Biro came in, is that correct?

A That's correct.

Q You also told us there were two or three other times prior to May 12, 1975, when you had received envelopes to give to Mr. Millow?

A Yes.

Q Although you had never looked at the contents of those envelopes, correct?

A Yes.

Q Now, when that happened, on any of those two or three occasions, was there anybody at all in the store?

A I don't think there was.

Q Pardon?

A I don't recall if there was or not.

Q And you said that at some point while you were in the store, Mr. Millow would come in daily between 10:00 and 12:00 o'clock, is that right?

A Yes.

Q Once or more than once?

A It depended on whether Chick was in the store when he came the first time or not.

Q Well, if Chick was there the first time.

A He might stop in on his way to wherever he was [114] going, you know, once in a while, but he would usually just come in once.

Q He would usually just come in once?

A Yes.

• • • •

[117] Q You said that you observed almost daily numbers betting, is that correct?

A Yes.

Q Did that occur right into February of 1975?

A Yes.

Q Of course you had talked to Officer Biro as far back as December of 1974, had you not?

A Not dealing with that. I talked to Mr. Biro all the time.

Q Well, did you come down here this morning with him?

A Yes, I did.

Q Did you have lunch with him?

A Yes, I did.

Q Did you talk with him about the case on Saturday?

MR. ABZUG: Objection as to relevancy, your Honor.

THE COURT: I will permit it.

A Saturday?

Q Saturday, right in front of the police station, five o'clock?

[118] A I was waiting for my boy friend

Q I didn't ask you that.

A No, I didn't talk to him about the case.

Q On Saturday at five o'clock?

A All I told him was you came and talked to me; he said okay.

• • • •

[124] Q Miss Hennessey, you told us just before we recessed that when Agent Emory came to your door, he [125] told you that he had gotten your name from the North Tarrytown police, do you recall that?

A Yes.

Q Would you give us, as best you recall, the substance of what he said to you about that subject?

A He just said that he had learned that I was employed by Mr. Ceccolini through the police department. He mentioned no names or anything of that sort.

Q Did you at that time recall the incident with Ron Biro?

A Not really.

Q You completely forgot—

MR. ABZUG: Objection. Argumentative, your Honor.

THE COURT: I will permit it.

THE WITNESS: Excuse me?

THE COURT: It wasn't in your mind at the time?

THE WITNESS: No, I just lost a soft ball game, and that wasn't on my mind.

THE COURT: The answer is no.

Q As you went through his questions and your answers, did the subject of Officer Biro come up?

A No. He just asked me if I remembered anything in December.

[126] Q I can't hear you.

A He just asked me if I had remembered an incident that happened in December.

Q He specifically directed your attention to that month?

A Yes.

Q What did you tell him in answer to that?

A I really don't remember.

Q Is it fair to say that you told him about the same December incident that you told his Honor about this morning.

A Yeah.

Q And of course by the time it got that far, then despite the softball game, you remembered the incident with Officer Biro, fair enough?

A Yes.

Q And having in mind the incident with Officer Biro, you described, just as you did here this morning, to Agent Emory what happened with Officer Biro?

A Yes.

Q Because when he told you that he had gotten your name from the North Tarrytown police department, you knew either that he already had that information or that he could get it from the North Tarrytown police, correct?

[127] A Yes.

Q You mentioned some football pools, do you remember that, on your direct?

A Yes.

Q Is it not a fact that you personally have bet such pools?

A Yes.

Q And you bet them with Mr. Bucci directly, and you bet them with Popper directly, is that correct?

MR. ABZUG: Objection, compound question.

THE COURT: Yes, sustained.

Q Let's take Mr. Bucci first. Is it fair to say that you made bets directly with him?

A No, I gave mine to Ceccolini.

Q Never bet directly with Mr. Bucci?

A No.

Q How about Popper?

A The only time I gave Popper them was when Ceccolini told me to, when he wouldn't be there when Popper would return.

Q Let's take that just for a moment. What time did Ceccolini go to work?

A He generally left at 2:00, but he used to go out to lunch with Rosemarie or he'd go home and change.

• • • •

[139] A Well, the first week of football he placed the bet with Mr. Bucci, and I hit, and it took me a while to get my money, and that is when he had told me that he doesn't like to bet with him or associate with him because you have a hard time getting your money.

Q Keep your vioce up if you can, Lois, please. Now you told us also that there were some football tickets that were kept under the right side counter, is that correct?

A Yes.

Q These were kept where under the right side counter?
A Under the wax paper.
Q Were they visible?
A No.
Q Can you tell us what you mean by the football season?
A Football season?
[140] Q Yes, when does it start, when does it end. Lois?
A Opening day, and to the Superbowl.
Q Would it include, say, December 18?
A Yeah.
Q All right. And on that day did you see Patrolman Biro find any tickets below the counter on the right side?
A He wasn't on that side of the store.
Q The register is on the other side?
A Yes, the register is on the left-hand side.
Q Although he was back behind the counter, you didn't see him discover any of those?
A They are hidden under the wax paper.
Q He didn't look and you didn't show?
A No.
Q Now you have told us that out of all these people that were betting football, baseball, basketball and policy, you recall a Ron Pietrowicz and a Mr. Lynch. We will exclude your brother. Anybody else there?
A Not that I can, you know—I know guys, but I don't know their names.
Q Any other names, Lois?
A I can't remember names. I know Ron because he would come in every day, he used to drop by every day.
[141] He worked with Ralph.
Q He worked with Ralph?
A Yeah.
Q He is a correction officer?
A Yes.
Q This was despite the fact that policy was going on every day, football every weekend, baseball during the season and basketball from time to time, is that correct?

MR. ABZUG: Objection as to form.
THE COURT: Sustained.
Q Let me ask it this way, Lois, didn't you tell us that policy bets were occurring almost every day?
A Yes.
Q Football every weekend?
A Yes.
Q Basketball from time to time?
A Yeah.
Q And baseball during the season?
A I can only tell you baseball for three weeks in June.
Q The time you were there during the season, baseball, what, on a daily basis?
A Ron used to come in every day and leave something to give to Hank.
[142] Q Ron Pietrowicz?
A Yes.
Q With all of this action going on, there is exactly two people whose names you know placing bets?
MR. ABZUG: Asked and answered, your Honor. I object.
THE COURT: Yes, it has been.
Sustained.
Q You were asked what is Popper's real name, do you recall that?
A Yes.
Q How did you find that out?
A I read it in the newspaper, right after he got busted.
Q So the only knowledge you have on that is something you read in the newspaper?
A I knew his last name was Millow when he lived on Cedar Street.
Q As far as his first name or his middle name, that subject you got from the newspaper?
A Yes.
Q In fact the only name you ever heard for him was Joe, other than Popper, isn't that correct?
A Yeah.

[143] MR. AURNOU: May I have just a moment, your Honor, to look at some material.

THE COURT: Yes, certainly.

(Pause.)

Q Let me ask you this. The time Officer Biro came into the store on December 18, he was in uniform, was he not?

A Yes, he was.

Q And I think you told us you are a police science student, is that correct?

A Yes, I am.

Q So you would have a great deal of respect for that uniform, would you not?

A Yes, I do.

Q Did you tell Mr. Ceccolini about the events of that day when they occurred?

A No, I didn't.

Q Did you tell him within the next week?

A No.

Q Is there any particular reason for that?

A Didn't think it was important.

Q Pardon?

A I didn't think it was important at the time.

Q In other words, a uniformed police officer [144] came into the store, examined the envelope, he did tell you what he found inside, did he not?

A No, he did not.

Q And therefore you thought nothing of it, although you knew at the time what Millow was doing?

A Yeah.

Q I mean it is your testimony that throughout this period of time you knew Millow was a gambler?

A Yeah.

Q And you tell us you knew Ceccolini was accepting bets?

A Yeah.

Q And Ceccolini left an envelope for Millow and the cop came in and searched the envelope, and you didn't think it was important enough to tell him, right?

MR. ABZUG: Objection. They weren't her wagers, your Honor.

THE COURT: Sustained. Not for that reason. Sustained. It is argumentative.

MR. AURNOU: I will rephrase it.

Q Ceccolini leaves an envelope for Popper.

MR. ABZUG: Is that a question, your Honor?

Q You have previously had envelopes left by [145] Ceccolini or Popper, correct?

A Uh huh.

Q You believed at the time that you knew Ceccolini was involved in gambling, did you not?

A Yes.

Q And that the gambling was going on with Mr. Millow or Popper, yes?

A Yes.

Q And the police officer came, and looked in the envelope which Ceccolini had left for Popper, correct?

A Yes.

Q And he asked you what it was, and what it was doing there, correct?

A Yes.

Q And you answered his question, correct?

A Yes.

Q And you didn't think it was important enough to tell your boss about it?

A No.

• • • •

[153] [REDIRECT EXAMINATION OF LOIS HENNESSEY]

Q You mentioned on December 18, 1974—I direct your attention to that date. When did Ceccolini return to the flower shop? You mentioned he returned that day. Do you recall?

A I believe it was about 3:30.

Q In any event, it was after the pass had been made of the envelope, is that correct?

A Yes.

Q Directing your attention to the number of times that Ceccolini gave you an envelope to give to Millow,

after he gave you the envelope, did he ever ask for it back?

A No.

Q In April of 1975, do you remember when that was approximately when Mr. Emory came in and spoke to you?

A Yes.

Q And that was at your house, right?

A Yes.

Q And that was in the presence of your mother, [154] is that correct?

A My mother and two sisters.

Q How long did that conversation last?

A About 15, 20 minutes.

• • • •

[165] [DIRECT EXAMINATION OF ROSEMARIE ALBANESE]

Q Do you recall testifying before the grand jury on October 6?

THE COURT: Substantially every time that you were there that you saw him there?

THE WITNESS: Yes, I would say so.

MR. ABZUG: Thank you, your Honor.

THE COURT: She said she couldn't say for sure every time, but she has stated substantially every time. We don't need to go into that any further.

Q Was the defendant in the flower shop when Millow would be in the flower shop?

A Yes.

Q Did you ever observe them engage in conversation?

A Sure.

Q Did you overhear all of their conversations?

A No.

Q Did you see, were you in Mr. Ceccolini's presence and Mr. Millow's presence during the entire time, every time they were in the flower shop?

A No.

Q Directing your attention to May of 1975, do you remember the defendant receiving a subpoena?

[166] A I wasn't present when he received it.

Q Do you remember the defendant speaking to you about receiving a grand jury subpoena in May of '75?

A Yes, sir.

Q Now directing your attention to the week immediately preceding the defendant's grand jury appearance, did you have a discussion with Joe Millow?

A Are you speaking about the—

MR. AURNOU: I am going to object to this entire line of questioning. Apparently what my brother is trying to do is to introduce against my client the statement somebody else made. I don't see any way, there is no conspiracy count here.

THE COURT: What is the question?

MR. ABZUG: The question is, now directing your attention to the week immediately preceding defendant's grand jury appearance, did you have a discussion with Joe Millow.

MR. AURNOU: The defendant is not shown to be present, and even assume he was—

THE COURT: She can answer just yes or no.

THE WITNESS: What was the question? I am sorry.

THE COURT: A week before Mr. Ceccolini appeared before the grand jury, did you have a discussion with Mr. [167] Millow?

A Yes, sir.

Q And where did that discussion take place?

A In the flower shop.

Q Approximately what time?

A It wasn't a week before. It was approximately three days before.

Q Approximately what time did this discussion three days before his grand jury appearance occur?

A I would say around eight o'clock at night.

Q Who besides yourself and Mr. Millow was present?

A As in my grand jury testimony, I was not aware that anyone else was present. You said is it possible that Kathie Kosilla was present. I said it was possible. You said—

MR. ABZUG: Excuse me. Your Honor, I ask this Court to strike that as unresponsive.

THE COURT: Do you have any recollection whether anybody else was present?

THE WITNESS: I have no recollection whatsoever.

Q So the only people that were present at that meeting were yourself and Mr. Millow, is that correct?

A No, Mr. Ceccolini.

Q That was my question. Thank you. Now, did Mr. [168] Millow say anything to Mr. Ceccolini?

A Yes.

Q Could you tell the Court what Mr. Millow said to Mr. Ceccolini?

MR. AURNOU: I make the same objection, your Honor.

THE COURT: No, the defendant is present; if the defendant is present, I will take it subject to striking it. The defendant being present, you may answer.

A Mr. Millow walked into the flower shop and said to Mr. Ceccolini, "You are going downtown Monday to see the big boys," something to that effect, "and whatever they ask you, just tell them you don't remember, because if you don't remember, that is not lying." And I at this point said to Mr.—

Q The question now was what did Mr. Millow say to Mr. Ceccolini.

MR. AURNOU: I renew my motions, your Honor.

THE COURT: No. Go ahead.

Q Did Mr. Ceccolini say anything to Mr. Millow?

A No, I did.

• • • •

[172] Q And during those two months, did Lois Hennessey work at the Sleepy Hollow Flower Shop, of your own personal knowledge?

A No, she did not.

Q You said that while you worked at the flower shop you took phone calls?

A Yes.

Q Did you ever take any phone calls or have anybody who called the store talk to you about gambling?

A Never.

Q Did you ever see either anything that you recognized as gambling materials or moneys connected therewith change hands in your presence in the Sleepy Hollow Flower Shop?

MR. ABZUG: Objection, your Honor. Improper foundation.

THE COURT: No. I will permit it.

Q Let me ask you this way, Rosemarie. If you saw a football ticket, would you know what it was?

A Now I would.

Q All right. Did you ever seen one such in the Sleepy Hollow Flower Shop?

[173] A No.

Q Did you ever hear anyone in the Sleepy Hollow Flower Shop talk about betting?

A No.

Q Did you ever see Joe Millow accept any kind of money from Mr. Ceccolini at any time that you were in the store?

A No.

• • • •

[184] [DIRECT EXAMINATION OF RONALD BIRO]

Q Directing your attention to December 18, 1974, did you have occasion to enter the Sleepy Hollow Flower Shop that day?

A Yes, sir, I did.

Q Where is the Sleepy Hollow Flower Shop located?

A It is located at 52 Beekman Avenue.

Q Approximately what time did you enter the [185] Sleepy Hollow Flower shop?

A Between 12:30 and 1:00 P.M.

Q Who if anyone was present?

A Lois Hennessey was in the store.

Q Could you tell the Court what occurred after you entered the shop?

A Yes, sir. As I walked into the store, I said hello to Lois, and I walked to the back of the store, and I lit up a cigarette and I was talking to Lois, and sitting

on the top of a cash register drawer was an envelope with some money sticking out of it, and I picked the envelope up and I looked at the contents.

Q Could you describe the envelope generally to the Court, please?

A Yes, sir. It was a small white envelope with some paper and some money inside of it.

Q How long did you examine the contents of the envelope?

A Couple of minutes.

Q Did Lois Hennessey say anything to you either immediately before or during your examination of the envelope's contents?

A No, sir.

Q What did you do with the envelope after you [186] examined its contents?

A I asked Lois who the envelope belonged to.

Q And what did she respond?

A She said it belonged—

MR. AURNOU: Your Honor, at this point I think it would be appropriate for me to renew my objection based on the testimony you have previously received from the witness Lois Hennessey, and based on the testimony you are presently receiving from this witness, I believe that this is clearly inadmissible.

THE COURT: Let me suggest this, Mr. Aurnou: I will take it, I suspect, as an improper seizure, but I will take it.

MR. AURNOU: If your Honor is saying you will reserve ruling on my objection until you have heard it all, I would like the record to reflect I have no objection to that procedure.

THE COURT: That is what I intend to do.

MR. AURNOU: I just was in a position, your Honor, where I did not want it to appear I was waiving that objection.

THE COURT: I understand. You are not waiving it.

Proceed. You will have an opportunity to [187] argue it.

MR. ABZUG: I would appreciate that.

THE COURT: You will have an opportunity. I am taking it now. It is my opinion at this point—I will let you argue it.

BY MR. ABZUG:

Q After you replaced the contents of the envelope into the envelope, what if anything did you say to Lois Hennessey?

A I asked Lois who it belonged to.

Q And did she say anything to you?

A Yes, sir, she did.

Q What did she say?

A She said it belonged to Ralph—

MR. AURNOU: I have no right to a continuing objection, so may the record simply reflect that all of the testimony here on in is objected to by me?

THE COURT: I think you have made your objections to the fact that you don't believe that any of this testimony with respect to the search itself or what was found in the search is admissible, and you have an objection.

MR. AURNOU: Also on the further ground that my client would not be bound by the statement made out of his presence by Lois Hennessey.

[188] THE COURT: All right. She has already testified on direct as to what she had to say.

MR. ABZUG: Not only that but—

THE COURT: Please, no sense in arguing.

Q What did Miss Hennessey say to you?

A She said that the envelope belonged to Ralph and that somebody was coming in to pick it up.

Q After she said that, what did you do with the envelope?

A I put it back on top of the cash register and I left the store.

Q Based on your professional opinion and training, were you able to form an opinion,—well, describe first of all to the Court what the contents of the envelope contained.

A Three or four white pieces of paper and on the left-hand side were three digit numbers, and some of the numbers had a small bracket with either a one or a two or a three after it, and one of them had a different number like 660 or 307 on it.

Q Did the envelope contain anything else other than these slips of paper?

A Yes, sir, that contained money, paper currency.

Q What denominations?

[189] A Different denominations.

Q Based on your professional opinion and experience and training, were you able to form an opinion as to what the envelope that you examined on December 18 contained?

A Yes, sir.

Q And could you give the Judge that opinion, please?

A Policy plays.

• • • •

[199] [CROSS EXAMINATION OF RONALD BIOR]

Q Now, on the particular day you came into the Sleepy Hollow Flower Shop and if I understood the testimony of previous witnesses correctly, the flower shop is bisected or divided by a counter that runs across the length of the store, with an opening in the middle, in front of the [200] display case, is that fair, sir?

A Yes, sir.

Q Would you agree that it is also fair to say that the public area is the distance between the front door and the counters and the working area is the distance behind the counters?

MR. ABZUG: Objection as to form. Public.

MR. AURNOU: I don't think so.

THE COURT: I will permit it.

MR. ABZUG: Conclusion.

THE COURT: You understand the question, don't you?

THE WITNESS: Yes, sir, I do.

Q Is that fair, Ron?

A Yes, sir.

Q You did not remain in the public area as I understand it, you stepped between the two counters and sat down at some point with a cigarette, close to the register?

A Stood behind the counter, yes, sir.

Q So you were in what we might, for lack of a really good word, call a work area?

A Yes, sir.

Q And you noticed that over on the register next to you was a white envelope?

[201] A Yes, sir.

Q I think you said—but you correct me if I am in any way misstating your testimony—that you could observe American paper currency protruding from the envelope?

A Yes, sir.

Q That is all you observed, correct?

A Yes, sir.

Q The envelope had no writing of any kind, no marking on it, no printing, no nothing?

A No, sir.

Q No number, no letter, nothing?

A No, sir.

Q It didn't have a printed mark, it didn't have a handwritten mark, it didn't have a rubber stamp, nothing?

A Nothing.

Q Okay. When you turned it over, there was nothing on the other side?

A No, sir, there wasn't.

Q You picked up this envelope, and by the way, was this a little tiny flower envelope or just plain white envelope?

A Just a small envelope about this big.

MR. AURNOU: Indicating, your Honor, about six inches.

[202] THE COURT: I don't think it is that big.

Q How big would you say, four and a half inches?

A Four and a half, five inches.

MR. AURNOU: May I, your Honor?

THE COURT: Yes.

Q Four and a half inches. And you spent a couple of minutes, I think you said—you understand you are free to correct me if I misspeak at any point—looking at the contents of that envelope. You examined the currency, you saw how many bills there were, what the denominations were, you looked at the papers sufficiently to determine in your own mind what it was you were looking at, is that correct?

A Yes, sir.

Q And that took a couple of minutes, as I understand.

A Yes, sir.

Q All right. And Lois Hennessey, by the way, was sitting on the other side reading a newspaper, is that correct?

A Yes, sir, she was.

Q Then you called Lois' attention to the envelope and asked her particular questions about it. You asked her whose it was?

A Yes, sir.

[203] Q Is that correct?

A That's right.

Q She responded?

A Yes, sir.

Q She told you she was holding it with instructions to give it to someone?

A Yes, sir.

Q Did you ask her who the someone was?

A No, sir, I did not.

Q At that point you simply replaced the envelope on the cash register with all its contents intact?

A Yes, sir.

Q And left the store and went out and did school crossing duty or whatever it is you were doing?

A School crossing.

Q You weren't on a gambling investigation?

A No, sir, I was not.

Q And you didn't let this incident in any way deter you from the school crossings?

A No, sir, I did not.

Q Now there came a time the next day, when you spoke to Detective Spota?

A Detective DeFalco.

Q And Detective DeFalco?

[204] A Yes, sir.

Q About this transaction, did there not?

A I just talked to Detective DeFalco.

Q You did not speak to Detective Spota?

A I don't remember speaking to Spota the next day.

Q Did you convey to him the information concerning the incident of December 18?

A Yes, sir, I did.

Q Were you familiar with the fact that the detectives in North Tarrytown were at that time working with the Federal Bureau of Investigation in a gambling investigation?

A No, sir.

MR. ABZUG: Objection.

THE COURT: The answer is "no, sir."

I suppose it presumes that there is such a thing; the form of the question is bad.

MR. AURNOU: All right.

Q Let me ask you this, did there come a time when you were assigned to work on a gambling investigation with any agents of the Federal Bureau of Investigation?

MR. ABZUG: Objection as to relevancy, your Honor.

MR. AURNOU: Subject to connection, your Honor.

THE COURT: I will take it.

[205] A Yes, sir, there was.

Q You met Agent Emory, did you not?

A Once, sir, yes.

Q And certain other agents?

A Not FBI agents, no, sir.

Q You met some people from the District Attorney's or Sheriff's office?

A Yes, sir.

Q You conducted some wiretap surveillances in which you assisted?

A Yes, sir.

Q You conducted some physical surveillances which you made?

A Yes, sir.

Q And you became aware of the ongoing nature of this investigation?

A Yes, sir.

Q And in the course of meeting Agent Emory and all these other officers from different agencies you became aware that the investigation was both State and Federal?

A Yes, sir.

Q There came a time also when you were questioned or I won't say questioned in the sense of interrogation, but there came a time when somebody brought up again to [206] you the events of the 18th, did there not?

A Yes, sir.

Q As a matter of fact, you were asked to come down with Lois Hennessey, were you not, to Mr. Abzug's office?

A Yes, sir, I was.

Q And you were also asked to put into writing a description of the events of December 18, 1974, is that correct?

A Yes, sir, I was.

Q Now, prior to December 18, 1974, sir, had you ever interrogated Lois Hennessey as to any events occurring in the Sleepy Hollow Flower Shop?

A No, sir.

Q Prior to December 18, 1974, were you in any way aware that she had or was communicating envelopes containing policy plays to Mr. Millow or anyone else?

A No, sir.

Q Would it be fair, Officer, if I said that on December 18, you learned that?

A Yes, sir, it would be.

Q All right. And that was how you first discovered that Lois Hennessey could provide law enforcement officers with this information?

[207] A Yes, sir.

Q She provided it to you as a result of what you found in the envelope and the questions you asked?

A Yes, sir.

Q And you then imparted that to Detective—

A DeFalco.

• • • •

[223] [REDIRECT EXAMINATION OF RONALD BIRO]

Q Do you have any personal knowledge as of whether the defendant's flower shop was involved in any Federal investigation prior to December 18, 1975?

A '74?

Q '74.

A No, sir, I have no knowledge.

• • • •

[301] [DIRECT EXAMINATION OF LANCE EMORY]

Q Directing your attention to the year 1973, did you have an opportunity to personally participate in surveillances in Westchester County?

A Yes, I did.

Q Specifically what area of Westchester County?

A Well, specifically originating in the North Tarrytown, Tarrytown area.

[302] MR. AURNOU: Excuse me, your Honor, may I have the date of your question again?

MR. ABZUG: 1973. I am directing his attention to that year.

Perhaps I should interrupt at this point, your Honor. I do want to state for the record that I turned over certain surveillance logs as part of the 3500 material with respect to Special Agent Emory's testimony here today.

MR. AURNOU: The record should reflect you turned them over just a moment ago and they relate to something of which I had no knowledge previously.

MR. ABZUG: In any event, these logs were surveillances on December 6, 1973, December 4, 1973, December 1, 1973, and November 27, 1973, November 19, 1973, August 14, 1973 and July 31, 1973, and they are enumerated, 3505—

MR. AURNOU: 08.

MR. ABZUG: I am sorry, 3508 through 3514.

Q Now where in North Tarrytown did these surveillances take place?

A Well, in various locations, primarily either on Beekman Avenue, which is the main street, or Cortland Street.

[303] Q With respect to your surveillances on Beekman Avenue, did you observe certain individuals in the course of that investigation?

A Yes, I did.

Q Was one of those individuals a man by the name of Joe or Pop Millow?

A Yes.

Q Where did you observe him in the course of your investigations?

A I observed him on Beekman Avenue, speaking with various individuals, and also in the location known as the Sleepy Hollow Flower Shop.

Q With respect to your observations, including the observations made at the Sleepy Hollow Flower Shop and of Joe Millow during the year 1973, in which you personally participated, could you describe to the Court what those surveillances revealed? Are there documents which would refresh your recollection?

A Yes, I made surveillance logs of those observations.

MR. AURNOU: I don't know what the issue is on which these are offered. I just don't see the relevance.

MR. ABZUG: They are quite relevant, I believe, your Honor, to the issue.

[304] THE COURT: I do see it too. Your objection is overruled.

MR. ABZUG: Let the record show I am turning over surveillance logs, copies of which I have turned over as 3500 material.

Q Now directing your attention to these logs, could you begin with the earliest surveillance and proceed forward in time?

A Yes, sir. The earliest surveillance indicated in surveillance logs I have here is that of July 31, 1973, and it is a physical surveillance of the Sleepy Hollow

Flower Shop in the area on the street adjacent to it. In this particular surveillance, July 31, numerous individuals were observed to enter and leave the flower shop. No one was noted leaving the flower shop with any flowers. Surveillance was instituted at 10:34 and concluded at 12:15 P.M.

Q Directing your attention to the next surveillance, on what date did that occur, sir?

A August 14, 1973.

Q Could you describe to the Court what that surveillance revealed?

A Well, primarily the same as the previously described surveillance in that there were people entering [305] the flower shop and none that seemed to be engaged in the business of buying flowers.

Q Approximately from what period of time to what period of time was this surveillance made?

A This is from 11:05 in the morning to 11:27.

Q Directing your attention to the next surveillance, when did that occur in time?

A On November 19, 1973.

Q Could you describe what that surveillance revealed?

A On the 19th, I observed an individual known to me as Joseph Popper, whose true last name, Joseph Millow, was made known to me later, enter the Sleepy Hollow Flower Shop at 11:45 A.M.

Q What time did he leave?

A He left 11:47.

Q Two minutes later. And when did the next surveillance occur?

A The next surveillance was November 27, 1973.

Q What did that surveillance reveal?

A Individual entering and leaving the flower shop. Joseph Millow was seen to—let's see—was seen in the area of the flower shop. I don't think the log here indicates that I observed him entering.

[306] Q What time was he observed in the immediate vicinity of the Sleepy Hollow Flower Shop?

MR. AURNOU: Objection, your Honor, he didn't say in the immediate vicinity.

THE COURT: Yes.

MR. AURNOU: The log shows—
THE COURT: Sustained.
Q At what time was this observation of Joe Millow made?
A Around the first time I noted was 12:05 P.M.
Q When was the next surveillance made?
A On December 1, 1973.
Q Could you describe to the Court the times of the surveillance and what they revealed?
A At 11:55 A.M. Joseph Millow was observed leaving the North Tarrytown—I am sorry—post office and enter the Sleepy Hollow Flower Shop. He was out in, at 11:59 A.M.
Q That is four minutes later, is that correct?
A Yes, sir.
Q What did he do after he left the flower shop?
A Then he proceeded down Beekman Avenue into a store known to me as Malandrino's.
Q How long did he stay there?
[307] A He was in Malandrino's at 11:59 and out of Malandrino's at 12:06 P.M.
Q Now, directing your attention to the next surveillance when did that occur?
A December 4, 1973.
Q Could you describe to the Court what your surveillances then indicated?
A Surveillance on that day indicated that Joseph Millow entered the Sleepy Hollow Flower Shop at 11:37 and he was out of the flower shop walking in a westerly direction at 11:38.
Q Were there any other individuals observed enter the Sleepy Hollow Flower Shop?
A Yes.
Q Do you recall whether that individual bought any flowers?
A It would have been indicated on my log, sir.
MR. AURNOU: Objection to what would have been indicated, your Honor. It either shows or he recalls.
Q Does it indicate that the individual bought flowers?
A It does not indicate any flowers were taken from the flower shop.

Q Directing your attention to December 6—
[308] MR. AURNOU: I am going to move to strike that unless there is some testimony as to who this individual is.
THE COURT: I will permit it.
Q Directing your attention to the next surveillance, on what date did that occur?
A On December 6, 1973.
Q What did you observe in that surveillance?
A On that occasion also a surveillance of the Sleepy Hollow Flower Shop and the immediate area and I did observe Joseph Millow come out of the Sleepy Hollow Flower Shop at 10:45 A.M.

• • • •

[314] Q Now, was December 6, 1973, the last surveillance which you personally conducted in the immediate vicinity of the Sleepy Hollow Flower Shop?
A Of this nature, yes, sir.
[315] Q Could you tell the Court why you stopped the surveillance?
MR. AURNOU: I object to the form of the question.
THE COURT: Sustained.
Q Let me ask you this: In your professional opinion, based on the experience that you had in gambling investigations and specifically with the observations and surveillance photographs that you have made on these 70 occasions spanning approximately six months, did you come to any conclusion as to what the Sleepy Hollow Flower Shop was being used for?
MR. AURNOU: Objection, your Honor. He is asking him now for a state of mind he has had some time in the past.
THE COURT: I will permit it.
A Yes, sir.
Q What was that conclusion?
A From our observations we determined that the Sleepy Hollow Flower Shop appeared to be to us either a drop stop for policy or a pickup spot policy.
Q Could you explain to the Court what a drop stop or a pickup spot is?

A A drop spot could either be a place, a normal [316] betting place for any citizen to walk in and place a numbers bet, or it could be a location where gambling work is dropped to be picked up by another responsible person in the gambling operation, or it could be both of those descriptions.

• • • •

[339] Q Special Agent Emory, showing you what has been marked for identification as Government's Exhibit 13, have you seen that document before?

A Yes, sir, I have.

Q Showing you what's been marked for identification as Government's Exhibit 12, have you listened to a portion of tape contained in that exhibit box?

A Yes, sir.

Q And could you tell the Court, without specifying the contents of the conversation, who the conversation was between in Government's Exhibit 12?

A The conversation was between two individuals, one being Joseph Millow and one being Ralph Ceccolini.

Q And based upon your review of Government's Exhibit 12 for identification and Government's Exhibit 13 for identification, have you been able to form an opinion as to the subject matter discussed in the conversation [340] represented by that transcript and recorded on that tape?

A Yes, I have.

Q And could you tell the Court what that opinion was.

A In listening to the remarks made during this conversation, it's my opinion that the conversation is concerning some sort of gambling activity.

Q Between the two individuals?

A Yes.

Q And what is that opinion based upon, sir?

A The language used in the conversation in regard to money.

Q And could you be a little more specific, which particular language you are referring to?

A Well, language such as in the transcript reads: "Millow", at one point here, "Ah, you're figuring much higher."

And the word "figure" normally is used primarily in gambling lingo or gambling vernacular. You find it quite often.

Q What does it represent traditionally?

A Figure means, uses a total loss or win, in regard to a complete operation or to an individual bettor.

Q Any other portions of Government's Exhibit 12 [341] upon which you base your opinion that it pertains to gambling?

A Further down, in the same conversation:

"Millow: What do you figure?

"Mr. Ceccolini: Well, I don't know, when I get the figure I show it to you, I may be, I got it day for day. You don't have it day for day, huh?"

"Day for day" is also significant due to the fact that most gambling operations, or activities, are daily operations, and depending upon daily income and receipts, pays and collects.

• • • •

[360] [CROSS EXAMINATION OF A. LANCE EMORY]

And did there come a time when you became aware of an incident of December 18, 1974?

A Yes, sir.

Q Did you become aware of it for the first time as a result of an oral or a written communication?

A Oral, sir.

Q Who was the person who orally communicated it to you?

A I have tried to recall. It was either Detective Spota or Detective DeFalco, and I don't honestly recall which one.

Q Excepting that, can you recall the location where the communication occurred, sir?

A No, sir, I cannot. I'm sorry. I don't recall where it was.

Q Do you recall sir whether you made any record at that time concerning that communication?

A I did not make any record of it.

Q So that there is nothing from which I could ask you fairly to refresh your recollection as to that?

A No, sir.

[361] Q Did there come a time when you pursued that information?

A Yes, sir.

Q Before we go to that, officer, agent, excuse me, would you be kind enough to tell Judge Gagliardi, as best you recall, the general substance of what Detective Sergeant Spota or Detective DeFalco communicated to you about the incident of December 18?

A As I recall it, I recall hearing that Patrolman Biro had been in the flower shop, and I don't think I was given a date, because I think I would have made a record of it, I would have made a record of it, was in the flower shop, Sleepy Hollow, and while he was there he saw an envelope containing policy or gambling records. I'm not sure he said policy.

But that is just about the gist of it as far as I recall.

Q First of all, did they tell you the circumstances under which he came to see the content of the envelope?

A No.

Q So there was nothing to indicate to you in any way, no one communicated to you the thought that the search might have been an illegal one?

[362] A Under my understanding, I wasn't aware of what was told to me, I wasn't aware of a search. I think, I can recall that he saw the gambling records and an envelope, and I think accounts was mentioned.

Q A what?

A Accounts.

Q I misunderstood your word and I apologize. Nobody said to you the Bureau may have been searching illegally or even brought the question up when they gave you the information, did they?

A No, sir.

Q So you assume that what you were getting was simply an observation that a police officer had made legally, fair?

A That it was a general observation, which from what I knew would be legal.

Q At that same time, did they indicate to you that when he made the observation, there had been anyone present?

A I can only say that I think that, whichever one of the two detectives told me, said there was a girl in the shop, but I'm sure her name was never mentioned to me.

Q And you later found out who that girl was?

A Yes.

Q Let me see if I can reword it. If I state it [363] unfairly, you know that you have the right to correct me.

Would it be fair to say that you did not at that moment pursue whatever investigation you were engaged in to the point where you went immediately to locate and see this young lady, but that you left it for later follow-up; is that fair?

A That is fair.

Q Let me put it this way, as a conscientious, and I'm not being at all facetious or sarcastic, as a conscientious investigator, it was your duty and in fact you did follow up on this intelligence information which had been provided to you by the North Tarrytown police, is that fair?

A That's correct.

Q I couldn't hear you.

A That's correct.

Q And in time, and I realize it may be hard for you to fix a date; if you can, I'm sure Judge Gagliardi would appreciate it; so would I.

You did actually follow up this information, you did locate, and I believe you said interview Lois Hennessey?

A No, I don't think I said "interview."

Q Okay, I appreciate the correction.

You did locate and subpoena Lois Hennessey, is [364] that correct?

A That's right, sir.

Q And that as you said earlier, was a follow-up of the information which originally came from Patrolman Biro through the North Tarrytown Police Department?

A For that follow-up and for other reasons that I felt she would be knowledgeable of, outside of that incident of December 18.

Q Did I ask you that?

A No, sir.

MR. AURNOU: I move to strike as not responsive, your Honor.

THE COURT: Yes, strike it, the last part of it.

Q You have testified a great many times before.

THE COURT: We don't need to go into that.

MR. AURNOU: I apologize.

Q Now, Sergeant, when you caused Lois Hennessey to be subpoenaed or when you had occasion to subpoena her, you provided my friend and adversary, Mr. Abzug, with a summary of what you knew, did you not?

A Not on the initial contact. When I interviewed her, after the initial contact, I provided one.

Q That is what I'm trying to get at. You are [365] telling me that the initial contact did not involve an interview.

A No, it did not.

Q What was it, just a matter of subpoenaing her?

A A matter of subpoenaing her and getting some information regarding her person, which I could contact her if I needed to talk to.

Q You mean a telephone number and a person to call?

A That and her time schedule since she was a student.

Q There came a time when you in fact interviewed her?

A Yes, sir.

Q You followed up on this information from North Tarrytown, we have established, have we not?

A There came a time I interviewed her, right.

Q And at that time you did, and again, I'm just saying as a conscientious investigator, doing your job, pursue with her through your techniques of investigation or questions, the subject matter of what had transpired in Mr. Ceccolini's store relative to that envelope on December the 18th, 1974, did you not?

A I think in the subsequent interview I did not [366] ask her any questions regarding that incident, if I'm not mistaken. I'd have to have the actual 302 to refresh my memory.

Q May I see it, please?

MR. ABZUG: I believe it's irrelevant at this point, your Honor.

MR. AURNOU: I can't imagine what could be more relevant.

THE COURT: He said it would refresh his recollection if he looked at it.

A Of that interview. I also stated I don't think there is anything in that particular interview. I didn't ask her any questions regarding the event of December 18.

THE COURT: That form would help you find out whether or not you did, isn't that correct?

THE WITNESS: Yes, sir.

THE COURT: All right. Show it to the witness.

MR. AURNOU: May we have it marked for identification.

THE COURT: Yes, it may be marked for identification.

(Government's Exhibit 17 marked for identification.)

(Handed to the witness.)

[367] Q Have you read that and refreshed your recollection from it?

A Yes, sir.

MR. AURNOU: May I examine it, your Honor.

THE COURT: What's the question? First the question.

MR. AURNOU: The question, your Honor, was has he refreshed his recollection from it and the witness said yes.

THE COURT: With your recollection refreshed, can you tell us?

THE WITNESS: Yes, sir.

THE COURT: What is your answer.

THE WITNESS: There is nothing in my interview report of that day that has anything to do with December 18, 1974.

Q What date is that interview report, sir?
A The date of this interview? June 26, '75, sir.
Q June 26, '75.
Did you prepare any earlier report relative to Lois Hennessey?
A No, sir.
Q And did there come a time when you subsequently interviewed her and did, in fact, question her about the [368] events from which you furnished that information to Mr. Abzug?
A I'm sorry, I don't really understand your question.
Q I will rephrase it.
Let me withdraw it because there is something else I'd like to ask you.
Are you telling us now, I just want to be sure I'm eliminating this, I'm not making any accusation, are you telling us now that when you interviewed this witness in June of this year, you were not aware of the incident the previous December?
A Oh, no. No, sir.
Q So if you knew of the incident at that time, is it fair to suggest that the only reason you didn't ask her about it was because you knew by then that the search was illegal?
A Absolutely not.
Q All right.
Did there come a time when you did ask her about it?
A Not that I can recall, sir.
Q You never spoke to Lois Hennessey about the incident of December 18?
[369] A If you like for me to—
Q Just answer my question.
A The only thing I ever mentioned to Lois Hennessey was in the initial contact, that I thought she could be of assistance to the Government, and that we were looking for her assistance regarding a gambling matter at the flower shop, and if you construe that to mean the incident of December 18, then that would be the only instance.
Q It was the only specific incident of which you had knowledge when you spoke with her at that time, was it not?

A Only specific incident regarding the flower shop?
Q Of which she was present at.
A At that time, yes sir. That's right.
Q I mean we understand each other?
A That's right.
Q All three components and the only one that fits Lois, that you had information of at the time you contacted her, was that one.
In other words, there may have been other incidents that you for some reason were interested in but you had no way of knowing then that Lois had knowledge of, correct?
A That's right.
[370] Q And as a matter of fact, it's also correct to say, is it not Agent Emory, that you did not interview everybody who has worked in that store?
A No, sir.
Q I'm sorry.
A I did not interview everyone in the store, that's right.
Q I apologize, but sometimes we get answers like that and we can't tell whether the answer means yes or no.
I just wanted to make sure we had it.
A That's right.
Q Did there come a time, to your knowledge, when the young lady, Miss Hennessey was in fact questioned by some representative of the Federal Government about the events of December 18, 1974?
A I was under the impression that she was to speak of any and all gambling activities at the flower shop when she appeared before the Federal Grand Jury.
Q So what you are telling me is that prior to the time she came down to see Mr. Abzug she had never been asked about those events?
A I think that's correct, sir, by a Federal—excuse me.
[371] Q By a Federal Agent, of course?
A By a Federal Agent.
Q Yes, I appreciate that. Officer, Agent, I'm sorry, I mean no offense by that.

Agent, I would like you to understand that it's my recollection, just my recollection, that when Miss Hennessey testified here, she stated—

MR. ABZUG: Objection.

MR. AURNOU: May I finish the question, your Honor.

THE COURT: Yes, you may.

Q She stated under oath that on the very first occasion when she was subpoenaed, she was asked about the incident of December 18.

Now, with that in mind, would you reflect upon it a moment and see if it refreshes your recollection as to the conversation you had with her at the time that you had originally subpoenaed her. Just think about it for a second.

A I can tell you very quickly that on that occasion—I'd like to explain the actual contact with her.

Q I didn't ask you that, sir.

A Well, then, on that occasion, I absolutely did not discuss the incident of December 18 with her.

[372] Q All right.

And you are telling us that on that occasion you simply made arrangements to be able to contact her in the future?

A That's right. And asked her of her willingness.

Q The next time you spoke with her at all was to arrange for her to actually come down to see Mr. Abzug, is that correct?

A No, sir, I think she was notified, I'm not sure, but I think she was notified by telephone. I only spoke with her in person, as I can recall, twice.

Q Twice.

A Right.

Q Now, the first time you have told us about.

A Right.

Q I think. When was the second time?

A The second time is June 26, '75.

Q October. Where is that in time with Miss Hennessey's Grand Jury appearance, if you know?

A I'm not sure what date she testified.

Q Well now, if I told you that the Grand Jury testimony of Lois Hennessey indicates that it occurred on May 19, 1975, would that refresh your recollection, Agent, as to whether or not you spoke with Miss Hennessey at all [373] prior to her Grand Jury testimony, and subsequent to ascertaining her phone number?

A As I recall, I can't exactly remember for sure, but I think, if I recall correctly, I may have accompanied, brought her down to the Grand Jury, but I made so many trips, I can't be certain. I could check, there again I could check my appointment book, I think, and normally I record that, but I'd have to do that.

Q Did you make a check of your appointment book as a result of some testimony here yesterday to find out when you first subpoenaed Miss Hennessey?

A Yes, I did.

Q And are you able to tell us now what that date was?

A As best I could put it, put it within a range of three days, I think, approximately April 25 or around that date. Either April 24, 25 or 26, I think.

Q But it would not have been, in any event, later than May 1st.

A Not as best I can ascertain, sir.

Q I'm just trying to get a fair range.

A As best I can ascertain, those are the dates I put it.

MR. AURNOU: May I have Exhibit 2, sir?

[374] Q Let me ask you this.

Prior to interviewing Lois Hennessey or, let's say prior to the time that you first spoke to her in April, o'kay, did you communicate with Mr. Abzug the information concerning the Biro incident that you had received from the North Tarrytown Police Department?

A I think I did, sir.

• • • •

[REDIRECT EXAMINATION OF
A. LANCE EMORY]

[386] A We would, in the course of the investigation, would probably try to determine exactly how any policy work or gambling paraphernalia would be passed, if any.

Q And how would that be done, specifically?

A Well, I presume you are asking me a question how would it be done if the observation didn't prove to give us that information.

Q That's correct.

A First of all, I think we would look for someone that might give us that information without compromising the investigation.

Q Then what?

A And if we couldn't have gotten, not get the direct information through that means, there is really not many alternatives left outside of trying to get an employee in the store that would be an agent, acting as a source of information for the Government.

• • • •

[389] Q You mentioned that you did not specifically inquire of Lois Hennessey as to the December 18 incident the first time you met her, is that right?

A I did not inquire of her of that incident.

[390] Q Could you describe to the Court the circumstances surrounding that incident, the first contact?

A The first time I contacted Miss Hennessey I went to her home address, her residence, which is 95 Beekman Avenue, a large apartment building, a series of large apartment buildings, and went to her apartment, and she wasn't home; her mother was there, and she told me to stay, that she would be there after a short while. And I stayed approximately, I think, 20 minutes or so, and talked with her. And as I recall, I think one or two of her sisters also showed up at the time, and Lois did subsequently come in and I identified myself, and told her that the United States Government was interested in any information she might provide regarding incidents in the Sleepy Hollow Flower Shop.

Q You didn't limit it specifically to the December 18 incident?

A I don't think I alluded to that incident specifically, no. And I asked her if she would be willing to help the

Government, and she said she would, and she went about telling me about the fact that she was in Police Sciences at Westchester County College, she was interested in police work. In the atmosphere she seemed to be a little nervous, I think a little startled when she came up, and [391] I didn't pursue the interview for that reason.

MR. AURNOU: I object to any characterization what she seemed.

THE COURT: He's describing the interview.

A She was nervous.

MR. AURNOU: I renew my objection.

THE COURT: Overruled.

A I just felt, with the family, it wasn't time to interview her, it would be better if she talked to Mr. Abzug.

MR. AURNOU: I also move to strike, your Honor, what the agent felt.

THE COURT: Yes.

Q How long did you speak with her, approximately.

A Very brief time, because I remember it was pouring outside, and it was late already, I think it was probably late, 8 o'clock or 7:30 or something, somewhere along that time and I had another appointment.

I had waited for approximately 30 minutes.

Q How soon after, as best you can recollect, after you first found out about the December 18 incident, did you contact a representative of the United States Government?

A Pardon me?

[392] Q How much time elapsed after you first heard of the December 18 incident before you contacted an attorney for the Department of Justice, do you recall?

A Regarding that incident?

Q Yes, or regarding Lois Hennessey.

A I'd say it would have to be, strictly conjecture, I'd say it would have to be probably February or maybe even March, but I'm not at all positive.

Q February or March when what happened?

A Pardon me?

Q February or March when what happened, when you first learned of Lois Hennessey—

MR. AURNOU: Judge, that is when he said he contacted her.

THE COURT: Yes.

MR. ABZUG: I'm sorry.

Q Perhaps I'm not making myself clear.

What I'm asking was, how soon after you found out Lois Hennessey's identity, she was brought to your attention, did you bring it to the attention of the Department of Justice?

A I would say it would be probably March, because I didn't know her exact identity for a while.

THE COURT: What led you to Lois Hennessey?

[393] A I think she was identified by either Detective Spota or DeFalco to me as one of the employees of the shop and the girl that had been in the shop the day Patrolman Biro had seen the policy slip.

• • • •

[402] Q Special Agent Emory, why did you bring Lois Hennessey to the attention of the Department of Justice?

MR. AURNOU: Objection.

THE COURT: No, I will permit it.

A From what I knew of her, I felt she could aid in the investigation of the gambling matter.

Q And what did you know of her that led you to [403] reach that conclusion?

MR. AURNOU: Asked and answered, your Honor.

THE COURT: No, I will permit it.

A I knew she had been an employee at the Sleepy Hollow Flower Shop; I knew that supposedly as I had been told, she was present the day in which Patrolman Biro saw policy work, and by virtue of her information, being an employee, I felt she could aid us.

Q Was there any information other than the fact that you had discovered that she had been an employee of the Sleepy Hollow Flower Shop and the fact that she had been mentioned as a participant in this December 18 incident which led you to believe, which led you to interview her?

A The mere fact that she was an employee.

• • • •

[406] [DIRECT EXAMINATION OF JANE VITAGLIANO]

Q Did there come a time when you worked for Mr. Ceccolini?

A Yes, I worked for him.

Q Where did you work for him?

[407] A Sleepy Hollow Flower Shop on Beekman Avenue, North Tarrytown.

Q What capacity?

What did you do there?

A I'm sorry, I don't have a good vocabulary. I'm an arranger.

Q When did you begin working for Mr. Ceccolini?

A February 3rd, 1975.

Q Do you recall getting a Grand Jury subpoena?

A Yes, I do.

Q Do you recall giving testimony before the Grand Jury?

A Yes, I do.

Q Approximately what month did you get the Grand Jury subpoena?

MR. AURNOU: If your Honor please, I am sure that Mr. Abzug has that subpoena.

THE COURT: All right. You may lead.

Q Let me ask this way, when did you testify before the Grand Jury, do you recall?

A I don't remember.

THE COURT: Tell her.

Q July 21st, 1975, would that be accurate?

A I think it was in July.

• • • •

[410] Q Do you recall being asked how frequently Mr. Millow comes into the Sleep Hollow Flower Shop?

A Now, I do, now that I see this.

Q Do you also recall me asking you, or being asked in the Grand Jury, what the purpose was of Mr. Millow coming into the Sleepy Hollow Flower Shop?

A What the purpose?

Q Why was he coming into the Sleepy Hollow Flower Shop?

A Just say hi, whatever.

Q You recall being asked that before the Grand Jury, though?
A Now that, you know, I see this.
Q Do you recall being asked whether, in the Grand Jury, whether Mr. Millow or Popper, as you knew him, whether you passed any objects to him, such as envelopes or packages or slips of paper, do you recall being asked that?
A Yes, I do.
Q Do you recall being asked in the Grand Jury whether Mr. Ceccolini gave any pieces of paper or packages to Mr. Millow?
A Yes, I do remember that.

• • • •

[412] [CROSS EXAMINATION OF JANE VITAGLIANO]

Q During that time, have you seen Mr. Ceccolini involved in any gambling of any kind in any form with any person in any way whatsoever?
A No, I didn't.
Q Have you seen Joe Millow at the store, or Popper, whatever that person is known as?
A Long back, way back.
Q Did he come in from time to time, and you saw him there?
A Yes.
Q On any of those occasions, did you hear any conversation about betting, about horses, about policy, see any money pass, anything like that?
A No, I didn't.

• • • •

[420] [REDIRECT EXAMINATION OF JANE VITAGLIANO]

Q Do you know what a policy wager is?
A No, not until I asked Mr. Aurnou.
Q Mr. Aurnou told you what a policy wager was?
A No, I asked him because I keep on hearing it.

Q When did you first ask Mr. Aurnou what a policy wager looked like?
A I wanted to ask him.
THE COURT: When did you first ask him?
THE WITNESS: When? Saturday.
Q This Saturday?
A Yes.
Q It wasn't until this Saturday you knew what a [421] policy wager was, is that correct?
A Right.
Q And you don't know anything about policy wagers, is that correct?
A No, right.
Q You don't know what type of language is used to bet a policy wager, is that right?
A Language?
Q In other words, what people say when they bet a policy wager.
A No.
MR. AURNOU: Your Honor, again, none of this was gone into.
THE COURT: Yes, it was, you asked her whether she heard anything about betting of any kind and so forth.
I think he has the right to go into it now.
Q And you don't know if pieces of paper are used for policy wagers, do you?
A I mean, do you write on them, you need to write something on them?
Q But you don't know whether you have to write on a piece of paper to bet a policy wager or not, right?
A Well, Mr. Aurnou just told me Saturday, I just learnt this Saturday what they are, so obviously you write [422] on them, I guess.
Q But before what, before Mr. Aurnou educated you as to the mystery of policy wagering, you didn't know anything about it before then, is that correct?
A Right.
Q What about sports wagering, do you know what a football ticket looks like?
A No. I'm not a sports freak.

Q Not a sports freak. What about a horse bet, do you know what a horse bet looks like, a horse ticket looks like?
A No.
Q Or what a horse ticket, horse bet would even sound like?
A What?
Q How somebody would bet a horse bet?
A I couldn't tell you.
Q Same thing is true with a sports bet, isn't it?
A Right.
MR. ABZUG: No further questions.
MR. AURNOU: Nor I, your Honor.
THE COURT: Step down.
Next witness.

(Witness excused.)

• • • •

[DIRECT EXAMINATION OF
CATHLEEN KOSILLA]

[424] BY MR. ABZUG:

Q It's obviously Miss Kosilla.
A Right.
Q What is your address, please.
A 90 Howard Street, North Tarrytown.
Q Do you know a man by the name of Ralph Ceccolini?
A Yes, I do.
MR. AURNOU: We will concede that she's acquainted with him.
THE COURT: Very well. Identification conceded.
Q Did there come a time when you worked for Mr. Ceccolini?
A Yes.
Q From approximately what periods?
A From about May '73 to, till now, on and off, not steady.

[425] Q For a total of approximately how many months?
A I'm not sure. About six.
Q Six months.
A Yes.
Q Did you work full time or part time?
A Part time.
Q Do you recall testifying before the Grand Jury in July?
A Yes.
Q And do you recall being asked a number of questions in the Grand Jury pertaining to a man known to you as Pop Millow?
A Yes.
Q Do you recall being asked to describe Mr. Millow to the Grand Jury?
A Yes.
Q And do you further recall being asked whether Mr. Millow came into the flower shop in your experience there?
A Yes.
Q And do you recall what your answer was?
A Yes.
Q Approximately how many times a day does he come in?

• • • •

[428] Q Do you remember being asked whether your boss, Mr. Ceccolini, ever passed packages or envelopes to Mr. Millow?
A Yes.

• • • •

[CROSS EXAMINATION OF
CATHLEEN KOSILLA]

[429] BY MR. AURNOU:

Q Young lady, in the Grand Jury and today, what is your testimony concerning whether Mr. Ceccolini ever passed any packages, envelopes, money, anything you

recognize to be gambling or anything like that, to Mr. Millow?

A No.

• • • •

[DIRECT EXAMINATION OF ROSANNA PESCE]

[437] Q Did there come a time when you were employed at the Sleepy Hollow Flower Shop; do you know Ralph Ceccolini?

A Yes.

Q Do you see him here today?

A Yes.

Q Where is he?

A Right there.

Q Are you indicating the individual on my left?

A Yes.

MR. AURNOU: May the record reflect that she has identified the defendant, your Honor?

THE COURT: Yes.

Q Mrs. Pesce, would you tell the Court please when it was that you were employed at the Sleepy Hollow Flower Shop?

[438] A Well, the exact day, it was September, '74, till like the end of October, the beginning of November.

Q So it would be a period of at least two months, would it not?

A Right.

Q During that period of time was there anyone employed—by the way—excuse me, withdrawn.

How often did you work there, young lady?

A Five days. Monday through Friday.

Q Was it Monday through Friday?

A That's right.

Q During those two months, September and October '74, Monday through Friday, was Lois Hennessey over there, did she work there?

A She'd come in in the afternoon, like; she didn't work there; it was more or less a social call.

Q What period of time was she there during any given afternoon?

A It would be like right before I'd go home.

Q Just before five?

A Yes, right.

Q Would she be there for anything longer than a matter of minutes?

A That is about it, really.

[439] Q Because the store closes at that time, does it not?

A Right at about 5 o'clock.

MR. ABZUG: Objection.

THE COURT: I will permit it.

Q During that period of time that you were there, and the defendant Ralph Ceccolini was there, did you see anything that you could describe to us as gambling, horse betting, football betting, basketball betting, baseball betting, policy or passing of money by Mr. Ceccolini to anybody?

A No, nothing.

Q Not in September and not in October?

A No.

Q And did you know or come to know a man named Millow or Pop or Popper, did you ever see him?

A No.

Q Was there anybody else that was in the store regularly when you were there?

A No, except Rosemarie, she'd be there occasionally, Albanese.

• • • •

84

SUPREME COURT OF THE UNITED STATES

No. 76-1151

UNITED STATES, PETITIONER

v.

RALPH CECCOLINI

ORDER ALLOWING CERTIORARI. Filed May 2, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 239344 82

Supreme Court, U. S.
FILED
APR 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1151

UNITED STATES OF AMERICA,
Petitioner,

vs.

RALPH CECCOLINI,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

JOEL MARTIN AUBNOU
Counsel for Respondent
14 Mamaroneck Avenue
White Plains, N. Y. 10601

Table of Contents.

	Page
Questions Presented	1
Constitutional Provisions Involved	2
Statutory Provisions Involved	2
Federal Criminal Rule Involved	2
Preliminary Statement	3
Statement of the Case	4
POINT I. A Government appeal would offend the double jeopardy clause	10
POINT II. The courts below correctly excluded the fruits of the concededly illegal search	13
Conclusion	21
APPENDIX	A1

TABLE OF CASES.

Brown v. Illinois, 422 U. S. 590 (1975)	17
Serfass v. U. S., 420 U. S. 377 (1975)	11
Terry v. Ohio, 392 U. S. 1 (1968)	17
U. S. v. Jacobs, 547 F. 2d 772 (2 Cir. 1976)	5, 6
U. S. v. Kopp, 50 L. Ed. 2d 336 (1976)	11

	Page
U. S. v. Lucido, 517 F. 2d 1 (6 Cir. 1975)	11
U. S. v. Mandujano, 425 U. S. 564 (1976)	15
U. S. v. Marder, 474 F. 2d 1192 (1973)	19
U. S. v. Martin Linen Supply Co., 21 Cr. L. 3001	1, 10, 11
U. S. v. Morrison, 50 L. Ed. 2d 1 (1976)	11
U. S. v. Paepke, Supplemental Memorandum of Petitioner's Appendix A	15
U. S. v. Raftery, 534 F. 2d 854 (9 Cir. 1976)	15, 16
U. S. v. Rose, 50 L. Ed. 2d 5 (1976)	11
U. S. v. Turk, 526 F. 2d 654 (5th Cir. 1976)	15, 16
U. S. v. Wilson, 420 U. S. 332 (1975)	11
Wong Sun v. U. S., 371 U. S. 471 (1963)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1151

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH CECCOLINI,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Pursuant to an order of this Court, the time for filing the within brief has been extended to April 13, 1977.

Questions Presented.

In the opinion of respondent, the following questions are presented:

1) Does the double jeopardy clause, and the decision of this Court in *U. S. v. Martin Linen Supply Co.*, 21 Cr. L. 3001 (April 4, 1977), bar the Government's attempted appeal from the judgment of acquittal entered in the District Court pursuant to Rule 29?

2) Whether the holding of the Courts below, that the Government failed to meet its burden of establishing attenuation of the taint of a concededly illegal search, was free from error and supported by substantial evidence?

Constitutional Provisions Involved.

United States Constitution Amendment 5:

> "• • • nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; • • •"

United States Constitution Amendment 4:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statutory Provisions Involved.

18 USC §3731:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Federal Criminal Rule Involved.

Federal Rule of Criminal Procedure 29.

> "Motion for Judgment of Acquittal
>
> "(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> "(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
>
> "(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

Preliminary Statement.

The Government, pursuant to 18 USC 3731, appealed to the Second Circuit Court of Appeals from a judgment of acquittal entered in the Southern District of New York (Petitioner's Appendix D) on February 10, 1976, by the Hon. Lee P. Gagliardi, United States District Judge.

On that date, Judge Gagliardi announced that he acquitted the defendant on Count 2 and found him guilty on Count 1, but immediately set aside his verdict on Count 1 and granted defendant's motion for acquittal on the grounds that the evidence relied on by the Government was the unattenuated fruits of an illegal search.

Defendant contends that, under the circumstances presented by this record, a Government appeal violates the double jeopardy clause.

Defendant further contends that the courts below correctly held that the Government had failed to attenuate the taint of a concededly illegal search.

Statement of the Case.

In 1973, the Federal Government conducted a gambling investigation in the North Tarrytown area (TR 301-08). Surveillance by FBI agents had included various businesses on Beekman Avenue which were frequently visited by Joseph Millow, including defendant's flower shop. At no time during this period were the employees of *any* business enterprise located on that street questioned in regard to gambling activities. The surveillance was ultimately discontinued, in December, 1973 (TR 314).

On December 18, 1974, North Tarrytown Patrolman Ronald Biro, in uniform and on duty, entered the flower shop. A young lady named Lois Hennessey was present, observed him enter the store and continued to read her newspaper. Biro proceeded through the area open to the public into the portion of the flower shop customarily used *only* by the employees. He observed an envelope on the cash register from which allegedly protruded what appeared to be United States currency. Patrolman Biro proceeded, without further ado or probable cause, to seize

and search the envelope. He removed and examined the contents and then interrogated Miss Hennessey concerning them (TR 99-103, 185-88, 199-203). In this way he then and there discovered the existence of Miss Hennessey as a person having knowledge that could be utilized by the Government (TR 206-07). He replaced the envelope and its contents on the cash register, and left.* The defendant, who was not present at the time, was not aware that there had been a search (TR 143).

Within twenty-four hours, Patrolman Biro notified the North Tarrytown detectives (TR 203-04) who, in turn, notified FBI Agent Emory with whom they were then working jointly on a gambling investigation. Emory notified prosecutor Abzug (TR 374) and then interviewed Miss Hennessey specifically about the incident of December, 1974 (TR 363-64, 126-27; cf. 365-66). This interview occurred in or about April, 1975 (373). Thereafter, in May, 1975, defendant was subpoenaed before the grand jury, at which he appeared without counsel, and was somewhat disingenuously advised that he was not a target of the investigation (TR 373). By comparison, other witnesses in this same investigation were specifically advised of their right to counsel, of the privilege against self-incrimination, and were not given any disarming advice that they were not targets of the investigation, even when in fact they were not such targets. The 3500 material turned over by the Government showed, for example, that Miss Albanese, who appeared with counsel, was specifically warned of her privilege against self-incrimination and her right to counsel but received no statement that she was not a target of the investigation. Compare, *U. S. v. Jacobs*,

*It subsequently disappeared and there was thus no physical evidence in the possession of the Government to be suppressed. Only the testimony of Ptl. Biro (upon which Judge Gagliardi never ruled explicitly) and that of Miss Hennessey remained as the fruits of the illegal search.

547 F. 2d 772 (2d Cir. 1976). He was, however, indicted immediately thereafter when his answers were at variance with those of Miss Hennessey.

In the over six months between the illegal search and defendant's grand jury testimony, not a single other employee of this or any other business located on Beekman Avenue had been interviewed or approached by the FBI. Subsequent to his indictment, other employees of the flower shop were, in fact, subpoenaed whose testimony was consistent with that of the defendant and inconsistent with that of Lois Hennessey.*

The defendant made various motions in preparation for trial and the Court held a conference and made its rulings in July of 1975. Over two months thereafter the Government finally complied on the eve of trial. Its list of witnesses contained the name of Ptl. Biro who was

*Jane Vitagliano began working at the flower shop on February 3, 1975 (TR 407), which was long *after* the December period inquired into by the grand jury. She testified over two months after Ceccolini's testimony and after his indictment as did each other flower shop witness. Her testimony was that Millow came in just to say hello (TR 410). She had never seen any gambling of any kind at the shop (TR 412). Cathleen Kosilla, a part time employee (TR 420-25), was also summoned to the grand jury *after* Ceccolini had been indicted (TR 428). She had seen no gambling at the store (TR 429). Roseanna Pesce, who did work in the store in September and October of 1974 (TR 438) when Lois Hennessey did *not* work there (TR 438), was the wife of a New York City Police Sergeant (TR 437), had never been interviewed by the FBI, and saw absolutely no gambling (TR 439). Lois Hennessey was there only for a matter of minutes at 5 o'clock during these months (TR 438). Defendant's girl friend, Rosemary Albanese, brought to the grand jury in October *after* defendant's indictment (TR 165), saw absolutely no evidence of gambling at the flower shop (TR 172-73).

immediately interviewed by the defense. Defendant then learned for the first time of the existence of a search (TR 17-18).

The Government had contributed in no small measure to the defendant's surprise. Completely aside from failing to advise the defendant of a search of his premises when he was not present, and in the absence of a warrant or any conceivable probable cause, the Government took it upon itself to include in its discovery exhibits a certain envelope marked 12/31/74 which appeared to be, but was in fact not, the December envelope referred to in the grand jury testimony. Aside from its misleading appearance, it had absolutely no other significance on the outcome of the case.

When the defendant discovered the existence of the search, on the eve of trial, an immediate motion was made orally before Judge Gagliardi, who observed that the defendant could not have moved sooner because he had no knowledge of the search (TR 17-18). He directed that the hearing on the motion proceed simultaneously with the trial. Defendant waived trial by jury.

During the course of the trial, all of the testimony that related to the search and its fruits came from Government witnesses during the direct case: Ptl. Biro, FBI Agent Emory, Detectives Spota and DeFalco and Miss Hennessey. Judge Gagliardi determined *during the trial* that the search was illegal (Petitioner's Appendix 34A) and suppressed the results of the search. However, he also stated (Petitioner's Appendix 36A), "I don't think it makes any difference as to when I passed upon the exclusion of the fruits of the search because it was clearly inadmissible." His Honor also stated that, without the fruit of the illegal search, "there was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty

of Count 1 charged in the indictment" (Petitioner's Appendix 32A). The Court added that the remaining evidence, "standing by itself, it is insufficient to prove Ceccolini guilty beyond a reasonable doubt." *Id.*

Notwithstanding that the motion to suppress was made immediately prior to the trial, and then only because the Government had withheld the existence of the search from the Court and the defendant, the Court, which heard both the motion and the trial jointly, purported to decide the merits first and the ruling on the motion to suppress only thereafter in connection with the motion for judgment of acquittal.

In effect, the combined procedure of the Government and the Court resulted in depriving the defendant of a pretrial or during the trial suppression ruling (beyond the Judge's post-verdict statement that he excluded the results of the search and that it made no difference when he passed upon the exclusion of the fruits of the search which were clearly not admissible). In the normal course of events (had the Judge suppressed prior to or during trial, or prior to announcing his verdict), since the remaining evidence was clearly insufficient and so found by the Court, the defendant would have been entitled as a matter of right to an acquittal. Instead, the Court endeavored, by the order of its rulings, to create a right of appeal in the Government. It is respectfully submitted that the procedure utilized was, in fact, a judgment of acquittal or the functional equivalent thereof and that any attempted appeal therefrom violates the double jeopardy clause.

The illegal search itself was described by both parties present (TR 66, 101-02, 184-85, 202). Patrolman Biro added that he had no prior knowledge of Hennessey as a possible witness and that he specifically learned that

at and during the illegal search conducted by him on December 18, 1974 (TR 206-07). He testified that he notified his detectives within 24 hours. They testified that they notified FBI Agent Emory. Agent Emory testified that North Tarrytown Police notified him. Miss Hennessey stated that Agent Emory told her he got the information regarding her and the December incident from the North Tarrytown Police (TR 111) and that he specifically asked her about the December incident (TR 125). She described it to him *because she knew he already had or could get that information from the North Tarrytown Police* (TR 126). On the other hand, Miss Hennessey also testified that although it was football season and football tickets were hidden in the wax paper at the store, she did not show these to Ptl. Biro (TR 139-40).

It was clear from all of the testimony summarized above that the search was:

a) without probable cause,

b) without a warrant,

c) without consent,

d) not incidental to a lawful arrest, and finally

e) conducted by a law enforcement officer on duty and in uniform, without justification and unlawfully.

It was equally clear that Miss Hennessey and her knowledge were the instant and immediate fruits of that search and the interrogation which took place as a part of that search (TR 102, 206, 111, 125-26). The District Court specifically found the search illegal and suppressed both the results of the search (Petitioner's Appendix 35A) and the fruits of the search (Petitioner's Appendix 36A).

It then set aside the verdict on the first count, as the remaining evidence was clearly insufficient to convict, exonerated bail and, pursuant to the power vested in it by F.R.Cr.P. 29 entered judgment of acquittal in favor of defendant.

POINT I.

A Government appeal would offend the double jeopardy clause.

The recent decision of this court in *U. S. v. Martin Linen Supply Co.*, 21 Cr. L. 3001 (1977), brings directly into focus what happened in the District Court in this case. Because the Government chose not to utilize the provisions of Federal Criminal Rule 12(D)(1), providing for notice to a defendant that the Government intends to introduce evidence obtained by search and seizure, the defendant in this case was totally unaware that a search of his premises had occurred in his absence (Petitioner's Appendix 6A). Egregiously, the Government delayed complying with Judge Gagliardi's pretrial order for some months so that it was not until the eve of trial that defendant's counsel first learned of Ptl. Biro or that there had been a search. The District Court expressly recognized that the defendant could not because of the Government's conduct have moved to suppress earlier (TR 17-18). The Government originally took the position that "until the trial, the Government was not concerned about a 'taint problem' because it believed Biro's search to be lawful" (Government's trial memorandum of law, p. 11). At the trial, however, the Government utterly abandoned any argument that the search was consented to, or lawful, when the testimony of its own witnesses clearly established otherwise.

It is clear that the acquittal involved "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case." *Serfass v. U. S.*, 420 U. S. at 393. This was not an order dismissing an indictment but rather an acquittal based upon the insufficiency of the admissible evidence (see opinion of Mr. Justice Stevens, concurring, *U. S. v. Martin Linen Supply Co.*). It should be noted that the acquittal was based upon the judge's determination that the residuum of legal evidence introduced at the trial "was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty • • •" and "standing by itself, it is insufficient to prove Ceccolini's guilt beyond a reasonable doubt" (Petitioner's Appendix 32A).

This is not simply a case where the post-verdict ruling is to dismiss an indictment after a guilty verdict where no new trial would necessarily result if the Government prevailed. See, e. g., *U. S. v. Wilson*, 420 U. S. 332 (1975); *U. S. v. Morrison*, 50 L. Ed. 2d 1 (1976); *U. S. v. Rose*, 50 L. Ed. 2d 5 (1976); *U. S. v. Kopp*, 50 L. Ed. 2d 336 (1976).

In *Morrison* and in *Rose* there was neither an acquittal nor even an order of dismissal. There was merely an order of suppression, which provided that appropriate action would be taken if the order was affirmed on appeal or not appealed from by the Government. In *Kopp*, the court entered a dismissal (not an acquittal) based upon an error of law relating to a matter determined at a pretrial motion and not during the trial of the general issue. In *Wilson*, the District Court *dismissed* the indictment, again reversing a ruling on a motion made *prior* to the trial and not upon a matter in issue and litigated during the trial of the general issue as was the case here. Compare *U. S. v. Lucido*, 517 F. 2d 1 (6th Cir. 1975).

In this case there was no pretrial hearing because of the Government's failure to disclose the existence of the search and the District Court's insistence that, contrary to the preferable method of proceeding in the Second Circuit (Petitioner's Appendix, p. 7A), there would be a joint hearing of the motion and the merits. Moreover, there was no good cause shown for deferring the ruling on the motion to suppress until after the verdict (which is required by rule 12[e]) as distinguished from cause for hearing the general issue and the motion together. The clear understanding of defense counsel at the time that joint hearing of the motion and trial was ordered was that the ruling on the suppression motion would precede the verdict on each count and that the findings on each count would be based on that evidence which survived the motion to suppress (Petitioner's Appendix 33A). This original understanding of counsel was nowhere disputed by the court or the Government. It certainly was a significant factor in defense counsel's reaction to the court's decision to hold a joint hearing and the defendant's decision to waive trial by jury. The action of the Government had deprived defendant of the opportunity to raise the question earlier (Petitioner's Appendix 6A). Indeed, the findings of fact which the District Court made to support its judgment of acquittal were precisely those which result from a trial of the general issue that "there was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty" and that the admissible evidence "is insufficient to prove Ceccolini's guilt beyond a reasonable doubt" (Petitioner's Appendix 32A). Upon the unique facts of this case, the District Court's ruling, however denominated, was a judgment of acquittal based upon factual matters elicited at the trial of the general issue and the Government's attempted appeal therefrom offends against the provisions of the double jeopardy clause.

POINT II.

The courts below correctly excluded the fruits of the concededly illegal search.

In seeking to have this court review the exclusion of evidence in this case, the Government has also phrased its "Questions Presented" in its petition as to suggest that the exclusionary rule automatically prevents use of certain evidence or automatically requires the suppression of certain evidence. Neither of these suggestions represents what happened here. Both the District Court and the Circuit Court of Appeals painstakingly examined in meticulous detail the various factors involved. The search itself was by a uniform officer who had participated previously in the gambling investigation which related to the flower shop. He deliberately placed himself without consent in an area of the flower shop where he had no right to be. He deliberately seized and opened an envelope lying on the cash register which was in no way suspicious by reason of the fact that money appeared to be in the envelope or protruding therefrom since the cash register is not at all an unusual place for money. Having seized and searched the envelope without warrant, probable cause or consent, he then interrogated Lois Hennessey who was working in the store at that very moment. Thus, the illegal search was immediately exploited without the lapse of even a moment. Having gotten what he wanted from her, he replaced the envelope and its contents (apparently recognizing the contents as evidence of a crime for which he was duty bound to arrest but having no illusions at all about the propriety of his search). Within 24 hours he conveyed the information to detectives in his department; they conveyed it to FBI Agent Emory and Agent Emory to the prosecutor. The Government would have it that Emory was unaware of the illegality which tainted its origin. Purportedly he

did not even learn this when he went to talk to Miss Hennessey. She testified that she answered his questions *because* the FBI agent told her he had gotten her name from the North Tarrytown Police Department and she knew that he either already had the information or could get it from the North Tarrytown police (TR 126-27). There was thus a direct line from the illegal search and its accompanying interrogation to its exploitation. The Court of Appeals characterized this path as "both straight and uninterrupted." Judge Gagliardi specifically found that Lois Hennessey's knowledge first came to the attention of the Government as a result of the illegal search (Petitioner's Appendix 28A, 29A). The FBI agent testified that Hennessey came to his attention because of the illegal search (Petitioner's Appendix 30A). The court found that prior to the search the Government's attention had not focused on her. *Ibid.* No other employee of any of the businesses under investigation was even interviewed until after the defendant was indicted and then only because the indictment had exposed the existence of the ongoing investigation. FBI agent Emory testified that the entire history of the investigation had been to avoid employee contacts for fear of tipping off those being surveilled (TR 386). Moreover, at the time she was interviewed, Hennessey was no longer an employee of the store and therefore had no current information to provide. It is apparent that the finding of the District Court, affirmed on appeal, that the Government had failed to attenuate the taint of the illegal search was not clearly erroneous. Indeed, the Government conceded as much on oral argument in the Second Circuit. What the Government seeks to do here is to totally destroy the last vestige of the exclusionary rule by allowing illegally obtained evidence to come in as part of the prosecutor's direct case. Indeed, it comes in as the prosecution's entire case because without it the evidence against this defendant is concededly insufficient.

The Government's first argument is that the offense with which the defendant is charged occurred after the illegal search. Chalk that up to the ingenuity of the Federal Prosecutor. This defendant did not know of the illegal search. Certainly he had no intent to exploit its occurrence. He had no independent intent to commit any crime. He was the subject of a Federal subpoena from a prosecutor who knew of the search.* It was the prosecutor who exploited the illegal search not only in the secrecy of the grand jury but under the most egregious circumstances. See *U. S. v. Mandujano,* 425 U. S. 564 (1976), Brennan, J., and Stewart, J., concurring. The prosecutor did not tell Ceccolini of the illegal search and Ceccolini had no knowledge of it. Compare *U. S. v. Raftery,* 534 F. 2d 854, 857, n. 7 (9th Cir. 1976); *U. S. v. Turk,* 526 F. 2d 654 at 667, n. 39 (5th Cir. 1976). That distinction is alluded to also in *U. S. v. Paepke* set forth in the supplemental memorandum of the United States at page 14A. In addition, the Government's further conduct rose to a level of entrapment offensive to fundamental concepts of fair play embodied in the due process clause. The defendant appeared at the grand jury without counsel. He was given no warning of his right to counsel although that warning is normally given by United States attorneys in the Second Circuit. He was given no warning of his privilege against self-incrimination although that warning is usually given by United States attorneys in the Second Circuit. Still unaware of the illegal search, he was advised and, indeed, substantially disarmed by the prosecutor who told him (but not any other witness before this grand jury) that he was *not* a target of this investigation (grand jury minutes, p. 38; respondent's appendix, p. A1). This was the only advice he received from the prosecutor. By contrast, other

*And of its illegality if he spoke to his witnesses before issuing the subpoena.

witnesses appearing with counsel in this same investigation were warned specifically of their right to counsel, of their privilege against self-incrimination and were spared the advice they were not targets of this investigation, even where they were not such targets. This sequence of events, culminating in defendant's indictment, does not eliminate the suggestion of a sophisticated, calculated abuse of a grand jury.

It is particularly noteworthy that in the two cases cited by the prosecution for the proposition that such evidence should be admitted, the 5th and 9th Circuit Courts of Appeal took pains to point out that the situation might be very different if the defendant did not know prior to the grand jury of the illegal search. *U. S. v. Turk,* 526 F. 2d 667, 39; *U. S. v. Raftery,* 534 F. 2d 854, 857, n. 7 (9th Cir. 1976). As the 5th Circuit observes, there would be a deterrent value in prohibiting the surprise use of illegally seized evidence to obtain a perjury conviction.

It would seem that this is a classic entrapment situation. The defendant had no pre-disposition to go to the grand jury. He was there uncounseled, under compulsion of a Federal subpoena. He did not choose the subject matter of his interrogation or its time or place. He was clearly unaware that his constitutional rights under the 4th amendment had been violated. This was the basis upon which the prosecutor chose not to fairly apprise him of his situation but, rather, to steer him toward the shoals of a perjury indictment as he sat blindfolded, disarmed, uncounseled and unwarned in the grand jury.

This fact pattern is a far cry from those underlying the *Turk* and *Raftery* decisions in each of which the defendant sought to take advantage of his knowledge that the

search was illegal. A fair balance struck between the competing interests cannot allow the Government to play its cards as close to the vest as it did here and then allow it to turn around and request of this Court the right to violate the defendant's rights just one more time. Doubly so, where the evidence is introduced as part of the Government's *direct* case, and is the only evidence upon which a conviction may be based. In our view that procedure reeks of star chamber abuse. No case has gone so far as to sanction such a result and none should.

> "Courts which sit under our constitution cannot and will not be made party to lawless invasion of the constitutional rights of citizens by permitting unhindered Governmental use of the fruits of such invasions." *Terry v. Ohio,* 392 U. S. 1, 12-13 (1968).

In cases where official conduct is flagrantly abusive of 4th amendment rights, the deterrent value of the exclusionary rule is most likely to be effective. The corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied in this case. See, *Brown v. Illinois,* 422 U. S. 590 (1975).

It is perhaps apropos at this point to observe that Ptl. Biro had no reason to believe that his search was legal. His testimony excludes that possibility. Under the circumstances, to allow into the Government's direct case the results of so flagrant and deliberate an intrusion is to discard the 4th amendment. By reason of the fact that Biro returned the physical evidence to its original location after interrogating Miss Hennessey and its subsequent disappearance, there was no physical evidence to suppress. Unless the testimony of Biro and Hennessey is suppressed, the Government suffers naught for the flagrant violation and the defendant's rights are

totally unvindicated, The Government seeks to escape the logic which excludes Miss Hennessey's testimony by virtue of the fact that she is a "live witness." It does not, however, suggest that the testimony of Ptl. Biro should thereby be admissible although he is equally alive. This is true because such a suggestion would make a shambles of any pretense at deterrence by allowing the physical evidence to be suppressed but the illegal searcher to describe it with exactly the same force and effect. Why should the rule be different if a second police officer is present to allow him to testify because he is a live witness? Why should the rule be different as to Miss Hennessey who is a live witness to whom Biro revealed his ongoing illegal search, thereby exploiting it directly?

The history of the exclusionary rule has taught us to decide these matters on a case by case basis taking into account a myriad number of factors. This is precisely what the courts below did. Over a decade ago in *Wong Sun v. U. S.*, 371 U. S. 471 (1963), the court stated at 485,

> "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest • • • is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."

At page 486, the Court added:

> "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, *Rea v. United States*, 350 U. S. 214, 76 S. Ct. 292, 100 L. Ed. 233, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins v. United States*, 364 U. S. 206,

> 80 S. Crt. 1437, 4 L. Ed. 2d 1669, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction."

Speaking of live testimony, the 5th Circuit stated in *U. S. v. Marder*, 474 F. 2d 1192 (1973), at 1196:

> "Any other conclusion would be totally inconsistent with the fundamental purpose of the exclusionary rule; to instill respect in government officers for a citizen's fourth amendment rights."

If the purpose of the exclusionary rule is to deter future unlawful police conduct and to effectuate the guarantee of the 4th amendment, it is clear that these purposes would be significantly, if not totally, destroyed by permitting the direct results of a deliberately illegal search to be used as the Government's direct case in a perjury prosecution based upon the concealment by the Government of the illegal search from the victim of the illegality. The decision in this case does not conflict at all with the decisions of the 5th and 9th Circuits in *Raftery* and *Turk*. As we have shown, they specifically excluded the situation where the defendant was unaware as here of the existence of the illegal search. The same is true in the *Paepke* case cited in the Government's supplemental memorandum. The *Scios* case cited by the Government (Appendix E to the petition, p. 39A *et seq.*) involved a different fact situation. Inadvertently, the Government has failed to inform the court in its supplemental memorandum that the District of Columbia Circuit Court of Appeals not only granted rehearing *en banc* in that case but in the same order vacated the panel opinion upon which the Government relied *sua sponte*.

The balance of the Government's brief is devoted to quarrelling with the Court of Appeals' findings. Both the District Court and the Court of Appeals did indeed

consider the lapse of time between the search and the witness' first response. There was no lapse of time. The witness was forced to respond immediately when confronted with the fruits of the search. That was her initial response not her response to agent Emory some time later when she already knew that he had or could get the information from the North Tarrytown police. The courts below considered and rejected the factual premise upon which the Government sought to argue that Miss Hennessey might have been discovered apart from the improper search and the Government has not sought review of that matter here (petition, p. 13). The Government attempts to argue that Lois Hennessey was not coerced. But the Court of Appeals observed that the District Judge made no specific findings regarding Lois Hennessey's state of mind (Petitioner's Appendix, 13A).* It is certainly arguable that she was coerced, finding herself confronted by a uniformed policeman holding incriminating evidence and asking incriminating questions of the only other person at the scene of the alleged crime. The courts below also considered the flagrant violation of defendant's rights, the lack of colorable excuse for the officer's conduct, his direct exploitation of the primary illegality and his actions in covering up the illegal search by replacing the physical evidence among other factors. To accept the Government's position in this case would be to clearly invite illegal searches, prosecutorial ingenuity in utilizing the fruits of such searches to create future crimes, as was done here, and the instant demise of the imperative of

*New findings would, of course, violate the double jeopardy clause.

judicial integrity which forbids the usage attempted to be made of illegal evidence by the Government in this case.*

Conclusion.

By reason of the double jeopardy clause, the Government has no right of appeal. In the alternative, the courts below properly excluded the illegally obtained evidence and, because their decision is consistent with the cases in other circuits, certiorari should be denied.

April 12, 1977.

Respectfully submitted,

JOEL MARTIN AURNOU,
Attorney for Respondent,
14 Mamaroneck Avenue,
White Plains, N. Y.

*While we have not directly commented upon the Government's version of the facts, we are compelled to note with regard to footnote 11 on pages 17 and 18 of the Government's petition that, (a) Miss Hennessey was questioned immediately at the scene by Biro, (b) When questioned later by an FBI agent, she testified that she was constrained to answer his question because she knew he had or could get the information from the local police (TR 126), (c) the initial search of the envelope was totally flagrant in that it was not lying on a counter but upon a cash register in an area of a store customarily reserved only for employees where the police officer was not entitled to be at the time of the search or any other time, (d) since Biro knew of the surveillance of the flower shop, the search must be considered purposeful and there can be no question but that it was exploited instantly and thereafter directly, (e) Finally, there is no exception in the constitution for the casual inspection by a police officer of one's private papers in one's place of business in one's absence.

APPENDIX.

RALPH CECCOLINI, called as a witness, having been duly sworn by the Forelady of the Grand Jury, testified as follows:

By Mr. Abzug:

Q. State and spell your name, please. A. C-e-c-c-o-l-i-n-i.

Q. First name? A. Ralph.

Q. And that's pronounced Ceccolini? A. Ceccolini, Ceccolini.

Q. Where do you live, Mr. Ceccolini? A. 95 Beekman Avenue, North Tarrytown.

Q. When were you born? A. May 19th, 1931.

Q. Are you married? A. Divorced.

Q. Any children? A. Two girls.

Q. Mr. Ceccolini, you have been subpoenaed before this Grand Jury to testify in connection with certain violations of Federal Law, particularly those laws concerning gambling.

I would like to advise you at this time that you are not a target of the investigation.

Mr. Ceccolini, how are you employed?

Supreme Court, U. S.
FILED
APR 28 1977
MICHAEL RODAK, JR., CLERK

No. 76-1151

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1151

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

The government's petition presented two issues that we believe to be of substantial importance to the administration of the criminal law: (1) whether the exclusionary rule prevents the use of the fruits of an illegal search in a prosecution for perjury committed after the search; and (2) whether the exclusionary rule requires the suppression of the trial testimony of a witness whose identity or whose possession of relevant information was learned as the result of an illegal search. Respondent opposes the petition principally on the basis of his contention, which the court below rejected (Pet. App. 7a), that the Double Jeopardy Clause barred the government's appeal from the judgment of the district court. This reply memorandum is addressed primarily to that contention.

1. The court of appeals correctly concluded that the Double Jeopardy Clause did not bar the government's appeal from the action of the district court setting aside its finding of guilty, since a successful appeal by the government would not require a retrial but merely the entry of a judgment on the finding. *United States* v. *Jenkins*, 420 U.S. 358, 365; *United States* v. *Wilson*, 420 U.S. 332, 334-345. "[W]here a government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 5.[1] Indeed, in *United States* v. *Morrison*, No. 75-1534, decided October 12, 1976, *United States* v. *Rose*, No. 75-1535, October 12, 1976, and *United States* v. *Kopp*, No. 75-1536, decided December 6, 1976, this Court specifically held that the government can appeal the grant of a suppression motion made after the return of a guilty verdict.

In this case the district court carefully and deliberately reserved its ruling on respondent's motion to suppress the testimony of Lois Hennessey and on his motion for judgment of acquittal until after it had found respondent guilty. Only then did it set aside the finding on the basis of the conclusion that the testimony was tainted by the illegal search (Pet. App. 26a, 28a, 32a, 36a).

There is no basis for respondent's contention (Br. in Opp. 8) that the district court's actions were the "functional equivalent" of granting respondent's suppression motion before the finding of guilt and entering a judgment of acquittal based on the insufficiency of the evidence. As the court of appeals noted (Pet. App. 6a-7a), a

[1]Respondent's contention (Br. in Opp. 10) that *Martin Linen* supports his position is unfounded. The Court pointed out (slip op. 5) that the protections of the Double Jeopardy Clause are not animated unless two "threshold conditions"—including the prospect of a second trial—are satisfied.

district court has discretion either to rule on a suppression motion prior to trial (in which case the government could appeal a grant of the motion under 18 U.S.C. 3731), during trial, or, as here, to defer its ruling until after the verdict. Fed. R. Crim. P. 12(e). Indeed, since the admissibility of evidence is solely a question of law, the procedure followed by the district court, enabling the government to appeal its ruling of law, was clearly the appropriate one.[2]

2. Respondent answers our contention that the exclusionary rule should not prevent the use of the fruits of a search in prosecuting perjury committed after the search by arguing that because he did not know when he testified that the government had information about his gambling, it is somehow unfair to punish him for lying to the grand jury about it (Br. in Opp. 15-17). That argument merits little response beyond the observation that it raises nothing relating to the deterrent policies underlying the exclusionary rule. Whether a grand jury witness knows or does not know of a prior search obviously can have had no bearing on the decision of the police officers to conduct the search.

3. Respondent replies to our objection to the court of appeals' automatic exclusion of the testimony of a live witness by arguing that suppression of verbal evidence describing the fruits of an illegal search has always been encompassed by the exclusionary rule (Br. in Opp.

[2]In the circumstances of this case, the appropriateness of deferring the ruling of law until after the trial and thus permitting appeal of the legal issue constitutes "good cause" under Rule 12(e). Moreover, when respondent's counsel made his suppression motion at the outset of the trial, he explicitly stated that he had no objection to having the trial and the suppression issues proceed together (Tr. 17; see Tr. 187-188).

18-19). The argument misses the point. As the decisions cited in the petition (Pet. 14-18) recognize, there is an obvious and significant distinction between testimony that merely describes the evidence discovered by an illegal search and testimony by a knowledgeable witness about other matters wholly unrelated to the search. Certainly the exclusion of the former is a necessary adjunct of the exclusionary rule. But the blanket exclusion of testimony about other matters by a witness whose identity was discovered as a result of a search is not necessary to effectuate the purposes of the exclusionary rule, and, as our petition demonstrates, such testimony should not be mechanically suppressed as the fruit of an illegal search.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

DOJ-1977-04

Supreme Court, U. S.
FILED
AUG 11 1977
MICHAEL RODAK, JR., CLERK

No. 76-1151

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
RICHARD A. ALLEN,
Assistant to the Solicitor General,
SIDNEY M. GLAZER,
HOWARD WEINTRAUB,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision involved	2
Statement	2
Summary of argument	8
Argument:	
I. The courts below erred in suppressing evidence in a prosecution for perjury committed after an illegal search	12
A. The exclusionary rule should not apply to suppress evidence in prosecutions for crimes committed after an illegal search	12
B. The exclusionary rule should not apply in any event to the subsequent crime of perjury	25
II. The court below erred in concluding that the trial testimony of Lois Hennessey should have been suppressed as the fruit of an illegal search	30
A. The issue of admissibility of live-witness testimony alleged to be the fruit of an illegal search should be resolved on the basis of exclusionary rule policy rather than the case-by-case attenuation analysis applied to physical evidence and confessions	32

243-284—77——1

Argument—Continued

	Page
1. The evolution of traditional fruits/attenuation analysis	32
2. The case-by-case attenuation analysis of Wong Sun *and* Brown *provides unsatisfactory results when applied to live-witness testimony*	36
A. Causation and volition	38
B. Exploitation of the illegality	42
C. Temporal proximity	44
3. A case-by-case attenuation inquiry fails to give proper weight to exclusionary rule policies	44
B. The policies of the exclusionary rule dictate that live-witness testimony should generally be admitted even if in some sense it is a "fruit" of an illegal search	48
1. A general rule admitting live-witness testimony will not substantially impair the deterrent effect of the exclusionary rule	51
2. Exclusion of live-witness testimony is more costly to the administration of justice	57
C. The testimony of a witness should be excluded only if the evidence establishes that the illegal search was motivated by the specific purpose of discovering the names of potential witnesses	60

Argument—Continued

	Page
D. The testimony of Lois Hennessey should not have been suppressed under the *Wong Sun* and *Brown* attenuation analysis	61
Conclusion	63

CITATIONS

Cases:

Alderman v. *United States*, 394 U.S. 165	15, 45
Berenyi v. *Immigration Director*, 385 U.S. 630	54
Branzburg v. *Hayes*, 408 U.S. 665	29
Brewer v. *Williams*, No. 76–1263 (March 23, 1977)	54
Brown v. *Illinois*, 422 U.S. 590	*passim*
Brown v. *United States*, 375 F. 2d 310, certiorari denied, 388 U.S. 915	36, 41
Brown v. *United States*, 411 U.S.. 223	15
Bryson v. *United States*, 396 U.S. 64	25, 28
Desist v. *United States*, 394 U.S. 244	15
Edwards v. *United States*, 330 F. 2d 849	36, 41
Elkins v. *United States*, 364 U.S. 206	13
Frisbie v. *Collins*, 342 U.S. 519	46, 59
Harris v. *New York*, 401 U.S. 222	18, 27
Harrison v. *United States*, 392 U.S. 219	30, 47
Hoffa v. *United States*, 385 U.S. 293	59
Killough v. *United States*, 336 U.S. 929	54
Linkletter v. *Walker*, 381 U.S. 618	15
Lockridge v. *Superior Court*, 3 Cal. 3d 166, 474 P. 2d 683, certiorari denied, 402 U.S. 910	37, 40
Lopez v. *United States*, 373 U.S. 427	23

Cases—Continued

	Page
McLindon v. *United States*, 329 F. 2d 238	36, 40
Michigan v. *Tucker*, 417 U.S. 433	13, 15, 46, 59
Miranda v. *Arizona*, 384 U.S. 436	15, 27, 35, 46
Nardone v. *United States*, 308 U.S. 338	23, 33, 56
Oregon v. *Hass*, 420 U.S. 714	18, 19, 27
Parker v. *Estelle*, 498 F. 2d 625, certiorari denied, 421 U.S. 963	37, 41
People v. *Dannic*, 52 Misc. 2d 1012, 277 N.Y.S. 2d 331	37
People v. *Scharfstein*, 52 Misc. 2d 976, 277 N.Y.S. 2d 516	37, 40
Silverthorne Lumber Company v. *United States*, 251 U.S. 385	32, 33
Smith v. *United States*, 324 F. 2d 879, certiorari denied, 377 U.S. 954	31, 36–37, 41, 52
Smith v. *United States*, 344 F. 2d 545	36, 48
Stone v. *Powell*, 428 U.S. 465	12, 13, 19, 23, 24, 28
Terry v. *Ohio*, 309 U.S. 1	13
United States v. *Alston*, 311 F. Supp. 296	37, 42
United States v. *Bayer*, 331 U.S. 532	40, 58
United States v. *Beasley*, 485 F. 2d 60, certiorari denied, 416 U.S. 941	37, 41
United States v. *Brignoni-Ponce*, 422 U.S. 873	30, 60
United States v. *Calandra*, 414 U.S. 338	*passim*
United States v. *Cole*, 463 F. 2d 163, certiorari denied, 409 U.S. 942	54, 57
United States v. *Crouch*, 528 F. 2d 625, certiorari denied, 429 U.S. 900	37
United States v. *Evans*, 454 F. 2d 813, certiorari denied, 406 U.S. 969	37, 41

Cases—Continued

	Page
United States v. *Falley*, 489 F. 2d 33	54, 57
United States v. *Guana-Sanchez*, 484 F. 2d 590, certiorari granted, 417 U.S. 967, certiorari dismissed, 420 U.S. 513	37, 47
United States v. *Hoffman*, 385 F. 2d 501, certiorari denied, 390 U.S. 1031	37, 41
United States v. *Janis*, 428 U.S. 433	12, 13, 14, 17, 24
United States v. *Karathanos*, 531 F. 2d 26, certiorari denied, 428 U.S. 910	37, 41, 60
United States v. *Knox*, 396 U.S. 77	26
United States v. *Mandujano*, 425 U.S. 564	26
United States v. *Marder*, 474 F. 2d 1192	37, 41
United States v. *Martin Linen Supply Co.*, No. 76–120, decided April 4, 1977	7
United States v. *Morrison*, 429 U.S. 1	7
United States v. *Nardone*, 127 F. 2d 521, certiorari denied, 316 U.S. 698	34
United States v. *Paepke*, 550 F. 2d 385	20
United States v. *Paroutian*, 299 F. 2d 486	55
United States v. *Peltier*, 422 U.S. 531	12, 13, 15, 46
United States v. *Robinson*, 414 U.S. 218	48
United States v. *Raftery*, 534 F. 2d 854, certiorari denied, 429 U.S. 862	20, 21
United States v. *Schipani*, 414 F. 2d 1262, certiorari denied, 397 U.S. 922	57
United States v. *Scios*, C.A. D.C., No. 75–1619, decided August 23, 1976, pending on rehearing *en banc*	36, 41, 43
United States v. *Seohnlein*, 423 F. 2d 1051, certiorari denied, 399 U.S. 913	54

Cases—Continued Page
United States v. *Tane*, 329 F. 2d 848 37, 41
United States v. *Turk*, 526 F. 2d 654, certiorari denied, 429 U.S. 823 20, 21
United States v. *White*, 401 U.S. 745 59
United States v. *Wong*, No. 74–635, decided May 23, 1977 26
Walder v. *United States*, 347 U.S. 62 27
Wayne v. *United States*, 318 F. 2d 205, certiorari denied, 375 U.S. 860 54
Weeks v. *United States*, 232 U.S. 383 32
Williams v. *United States*, 382 F. 2d 48 37
Wong Sun v. *United States*, 371 U.S. 471 *passim* 15, 34

Constitution and statutes:
Constitution of the United States:
Fourth Amendment 2, 27, 28
Fifth Amendment 22, 26, 27
18 U.S.C. 1623 2, 5, 63
18 U.S.C. 2510 *et seq* 59

Miscellaneous:
Hume, *An Essay on Human Understanding*, § VII (1748) 39
McCormick on *Evidence*, § 71 (1954) 58
Note, *The Inevitable Discovery Exception to The Constitutional Exclusionary Rules* 74 Colum. L. Rev. 88 (1974) 54, 55
Prossor, *Law of Torts*, § 41 (4th ed. 1971) 39
Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. Rev. 32 (1967) 31, 39, 41, 43, 48
John Stein, *Enlisting Ourselves in the War on Crime*, The Washington Post, July 24, 1977 53

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76–1151

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–20a) is reported at 542 F. 2d 136. The oral opinion of the district court (Pet. App. 25a–37a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on September 15, 1976. A petition for rehearing and suggestion for rehearing *en banc* was denied on December 21, 1976 (Pet. App. 23a). Pursuant to an extension of time granted by Mr. Justice Marshall, a petition for a writ of certiorari

was filed on February 19, 1977; the petition was granted on May 2, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the exclusionary rule prevents the use of the fruits of an illegal search in a prosecution for perjury committed after the search.

2. Whether the exclusionary rule requires the suppression of the trial testimony of a witness whose identity or whose possession of relevant information was learned as the result of an illegal search.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of New York, respondent was found guilty of making a false declaration before a federal grand jury, in violation of 18 U.S.C. 1623. After finding respondent guilty, the district court then set aside the finding, ruling that

the testimony of government witness Lois Hennessey should be suppressed as the fruit of an unlawful search and that without her testimony there was insufficient evidence to support the conviction (Pet. App. 29a–32a). On the government's appeal, the court of appeals affirmed (Pet. App. 1a–20a).

1. The evidence at trial showed that in the second half of 1973 FBI agents conducted an investigation of gambling in North Tarrytown, New York, that included a surveillance of respondent's flower shop, a place that was frequently visited by Francis J. Millow, a target of the investigation. Their observations led them to conclude that the flower shop was either a drop spot or pickup spot for policy gambling operations. The surveillance was discontinued in December 1973 (A. 59–64).

About a year later, on December 18, 1974, a uniformed police officer, Ronald Biro, who had been assigned to patrol school crossings on that day, entered respondent's shop on a cigarette break. Biro was acquainted with Lois Hennessey, an employee in respondent's shop, and he went behind the customer counter and sat down next to her. As he was talking with her, Biro observed a small envelope on the top of the cash register drawer with money protruding from it.[1] Biro picked up the envelope, looked through its contents for a few minutes, observed that the envelope also contained policy slips, and put the contents

[1] The cash register was located on a table behind the counter (A. 33–34) (Tr. 556).

back in the envelope. He then placed the envelope back on the cash register (A. 25, 34–37, 41, 46, 51–56).

Biro did not inform Hennessey of what he had seen but did ask her whose envelope it was (A. 36–37, 56). Hennessey replied that it was respondent's and that respondent had told her to give the envelope to someone,[2] but she did not inform Biro who the intended recipient was. Biro then left the shop (A. 25, 36–37, 51–56). When he examined the envelope, Biro was unaware there had been a gambling investigation of the shop and had no reason to suspect that Hennessey was giving envelopes with policy wagers to Millow or anyone else (A. 56–57, 58–59).[3] One hour after Biro left, Millow came into respondent's shop and Hennessey gave him the envelope, pursuant to respondent's instructions (A. 25–26, 37).

On the following day, Biro mentioned what he had observed in the flower shop to other local police officers (A. 57) (Tr. 482), who in turn informed F.B.I. Agent A. Lance Emory that Biro had seen an envelope containing gambling records in the flower shop. Emory was not told of the circumstances in which the

[2] Respondent had placed the envelope on the cash register that morning after writing on a piece of paper, which he then put in the envelope. Respondent asked Hennessey to deliver the envelope to Millow when he came into the shop that day. Hennessey was not told what was in the envelope, nor did she look at its contents (A. 23–24, 40) (Tr. 129).

[3] Respondent was not present at the time Biro was in the shop (A. 24–25, 47–48), and Hennessey did not tell respondent about the events of that day because she "thought nothing of it" and "didn't think it was important enough to tell him" (A. 46–47).

information had been obtained, and he assumed that it had been legally obtained (A. 65–67, 70).

Approximately four months later, Emory interviewed Lois Hennessey at her home for about 15–20 minutes, in the presence of her mother and two sisters. After identifying himself, Emory told Hennessey that he had learned through the police department that she was employed by respondent and that the "Government was interested in any information she might provide regarding incidents in [respondent's shop]" (A. 37–42, 48, 67–72, 74–75). Hennessey, who was then studying police science in college and was interested in police work, said that "she would be willing to help the Government" (A. 74–75) (Tr. 390). Although Emory did not refer to the Biro incident, Hennessey told him about the events of that day (A. 38–43, 68–71, 74) (Tr. 109).

In May 1975, both Hennessey and respondent were subpoenaed to testify and did testify before a federal grand jury investigating possible gambling offenses. In his testimony on May 12, respondent unequivocally denied that he ever took policy bets at his shop either for himself or for Millow or that he ever discussed gambling business with Millow (A. 4–8).

Respondent was then indicted for making false declarations before a grand jury, in violation of 18 U.S.C. 1623, and was tried without a jury. Respondent's grand jury testimony was shown to be false at trial by the testimony of Hennessey. She testified that she had observed customers place policy and football bets with respondent and that those bets were then

given by respondent to Millow. Hennessey also testified that Millow came into respondent's shop almost daily and came in twice every Saturday during the football season, first to discuss point spreads with respondent and later to pick up bets placed by customers (A. 26–33, 40–41, 44–45).[4] A tape recording of an intercepted telephone conversation between respondent and Millow also implicated respondent in gambling activity (A. 64–65), as did the evidence of the physical surveillance of respondent's shop (A. 59–64).

2. At the conclusion of the trial, the district court found respondent guilty of perjury.[5] After making this finding, however, the court granted respondent's motion to suppress Hennessey's testimony,[6] ruling

[4] Another witness testified (A. 49–50) that she was present during a conversation between respondent and Millow on May 9, three days prior to respondent's grand jury appearance, at which Millow told respondent "[y]ou are going downtown Monday to see the big boys * * * and whatever they ask you, just tell them you don't remember, because if you don't remember, that is not lying" (A. 50).

[5] Respondent was acquitted on a second count of perjury, which charged that he had made false statements in the grand jury when testifying that he did not know that one Hank Bucci was involved in gambling operations.

[6] Before the evidence was presented, respondent had made a motion to exclude the testimony of Lois Hennessey on the ground that her identity was procured as a result of an illegal search. The court reserved decision on the motion until the trial was completed (A. 21–23). Consequently, during the trial the court heard testimony about the search of the envelope and what it disclosed from Officer Biro. However, the court stated that, in finding respondent guilty, "I excluded what were the results of the search * * *. If [the case] had gone to the jury I would have excluded, as I did from my own consideration, the envelope and the contents of the envelope * * *" (Pet. App. 35a, 36a).

that her testimony at trial was tainted by the fact that her potential as a witness "first came directly to the attention of the government as a result of an illegal search" and that the government "has not sustained its burden of showing that Lois Henness[e]y's testimony definitely would have been obtained without the illegal search" (Pet. App. 28a–29a). The court concluded that, without her testimony, there was insufficient evidence of respondent's guilt (*id.* at 32a).

3. On the government's appeal, a divided court of appeals affirmed (Pet. App. 1a–20a).[7] The court rejected the government's contention that the testimony of Lois Hennessey "was an act of free will sufficient to purge the taint of any unlawful invasion * * * on December 18, 1974" (*id.* at 12a). Noting that the F.B.I. agent had sought out Hennessey, it concluded that the district court's suppression of Hennessey's testimony was proper because "the road to Miss Henness[e]y's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted" (*id.* at 13a). The court also rejected the government's argument that the exclusionary rule should not be applied when the evidence derived from the search is being used to prove an independent crime, here per-

[7] The court first held (Pet. App. 7a) that the government could appeal the ruling of the district court. This conclusion was plainly correct. See *United States* v. *Martin Linen Supply Co.*, No. 76–120, decided April 4, 1977, slip op. 5; *United States* v. *Morrison*, 429 U.S. 1.

jury, that occurred after the unlawful intrusion (*id.* at 13a–15a).

Judge Van Graafeiland, dissenting, urged that the doctrine of attenuation of taint should have different application when the evidence under consideration is the testimony of a live witness. Since Hennessey was not coerced by the government into becoming a witness, and her testimony was clearly established as being the product of her " 'willingness to cooperate with the F.B.I.' " (*id.* at 18a), Judge Van Graafeiland concluded that the testimony should be admissible because the factor of the witness's willingness to cooperate sufficiently purged the taint of the prior search (*id.* at 17a–18a).

SUMMARY OF ARGUMENT

I

1. The exclusionary rule should not apply to suppress evidence obtained in, or derived from, an illegal search in the prosecution of a crime that was committed after the search occurred. Exclusion of evidence in those circumstances can have little, if any, incremental deterrent effect on police conduct, since police have little incentive to conduct searches for evidence of crimes that have not yet and may never be committed. The minimal deterrent effect of suppressing such evidence does not outweigh the substantial cost to society of applying the exclusionary rule in those circumstances.

2. There is, in any event, no basis in this case, or similar cases, for applying the exclusionary rule in the

prosecution of a subsequently committed crime. There is no evidence in the record suggesting that the search in this case was for the purpose of securing evidence for use in prosecuting a subsequent crime.

3. Even if it were ever appropriate to apply the exclusionary rule to some subsequently committed crimes, the rule should not apply in the case of subsequently committed perjury. This Court has firmly established that antecedent constitutional violations by the government provide no defense to the crime of perjury. Moreover, application of the exclusionary rule in the case of subsequently committed perjury before a grand jury would largely nullify *United States* v. *Calandra,* 414 U.S. 338, where this Court held that the imperatives of grand jury proceedings preclude witnesses from refusing to answer questions based on improperly obtained evidence.

II

Even if it were appropriate to apply the exclusionary rule to the subsequently committed crime of perjury, the court below erred in concluding that the trial testimony of a witness, whose identity or possession of relevant information was discovered as a result of police misconduct, should be suppressed as the fruit of that misconduct. This Court has not yet ruled on the question of live-witness testimony as the fruit of official misconduct, but that question has generated considerable conflict and uncertainty among the lower federal courts, as well as state courts. The question is

important to the administration of criminal law and should be resolved by this Court.

1. Principles of attenuation developed by the Court in connection with the exclusionary rule should preclude the blanket exclusion of a witness's testimony whenever it can be said that "but for" the official misconduct, the witness might not have testified. However, in our view, whether live-witness testimony should be excluded should not be resolved on a case-by-case basis in which courts attempt to decide such questions as whether and to what extent the testimony is causally related to the primary illegality, whether the testimony is sufficiently a product of free will to break the causal chain, or whether the testimony is a result of governmental exploitation of the primary illegality. Although *Wong Sun* v. *United States,* 371 U.S. 471, and *Brown* v. *Illinois,* 422 U.S. 590, establish the relevance of those questions in the context of verbal confessions following illegal arrests, they have limited utility in the case of live-witness testimony, and have generated widely disparate and inconsistent decisions in the lower federal and state courts. We submit that the issue of live-witness testimony should be resolved directly with reference to exclusionary rule policies, and thus in terms of whether the deterrent benefits of exclusion outweigh the social costs of exclusion.

2. Analysis of the question directly in terms of exclusionary rule policy requires an identification, on the one hand, of the incentives of police to engage in misconduct in order to obtain useful evidence, and, on the other hand, the consequences to society of ex-

cluding a certain type of evidence. In both respects the testimony of a witness by its nature differs significantly from other evidentiary fruits. Because of the inherent differences, police in the typical case have substantially less incentive to engage in improper searches or other misconduct to find useful witnesses, and the exclusion of a witness's testimony would have a commensurately less deterrent effect on police conduct. At the same time, the perpetual disqualification of a witness and all that witness knows imposes a significantly greater cost to society than the exclusion of other kinds of evidence. While the exclusion of testimony that merely describes other kinds of tainted evidence may be a necessary concommitant of the exclusionary rule, the exclusion of testimony by a witness concerning other matters does not in the ordinary case provide sufficient incremental deterrence to outweigh its social costs.

3. The only circumstances in which the exclusion of a witness's testimony would significantly serve the deterrent objectives of the rule would be when the police engage in a search or other misconduct for the specific purpose of discovering witnesses. While such an exception would be appropriate to the rule we suggest, this case clearly does not fall within it.

4. If the criteria set forth in *Wong Sun* and *Brown* v. *Illinois* were appropriate to the question of live-witness testimony, Hennessey's testimony should not have been suppressed. Her testimony was the product of her free will and was substantially removed in time from the initial search. The government did not ex-

243-284—77——2

ploit the initial search, and that search was not flagrant or purposeful.

ARGUMENT

I. THE COURTS BELOW ERRED IN SUPPRESSING EVIDENCE IN A PROSECUTION FOR PERJURY COMMITTED AFTER AN ILLEGAL SEARCH

A. THE EXCLUSIONARY RULE SHOULD NOT APPLY TO SUPPRESS EVIDENCE IN PROSECUTIONS FOR CRIMES COMMITTED AFTER AN ILLEGAL SEARCH

1. Assuming arguendo that Hennessey's testimony is an otherwise excludable fruit of Officer Biro's search of the envelope (but see Part II, *infra*) the courts below erred in suppressing that testimony in a prosecution for a crime committed after the search took place. If suppression of evidence has any deterrent effect on police conduct in those circumstances, it is negligible and surely does not outweigh the societal cost of excluding the evidence.[8]

Many decisions of this Court have made clear that the principal, if not the exclusive, purpose of the exclusionary rule is to deter official misconduct. See *e.g., Stone* v. *Powell,* 428 U.S. 465, 486; *United States* v. *Janis,* 428 U. S. 433, 446; *United States* v. *Peltier,* 422 U.S. 531, 536–539; *United States* v. *Calandra,* 414

[8] Although it is only necessary in this case to consider the suppression of the testimony of Hennessey, our argument in Part I, that the exclusionary rule should not apply to subsequently committed crimes, would also encompass tangible fruits of an antecedent search. As previously noted, n. 6, *supra*, the trial court excluded from his consideration the envelope and its contents, and while our argument would pertain to that ruling as well, it does not separately address it.

U.S. 338, 347. The Court has recognized, moreover, that the salutary societal goals of the exclusionary rule unfortunately entail substantial societal costs and that the nature and extent of the rule's impact on police conduct has not been clearly demonstrated. See, *e.g., United States* v. *Janis, supra,* 428 U.S. at 448–453; *Stone* v. *Powell, supra,* 428 U.S. at 489–491. Consequently, as the Court said in *United States* v. *Calandra, supra,* 414 U.S. at 348: "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[9]

In accordance with those principles, the Court has declined to apply the exclusionary rule in a variety

[9] While the Court has also justified the rule on the basis of principles of "judicial integrity" that make courts unwilling to become a "party to lawless invasions of constitutional rights" (*Terry* v. *Ohio*, 392 U.S. 1, 13; *Elkins* v. *United States*, 364 U.S. 206), the Court has recently explained that those principles require "essentially the same [inquiry] as the inquiry into whether exclusion would serve a deterrent purpose." *United States* v. *Janis*, 428 U.S. 433, 458–459, n. 35. That is, principles of judicial integrity preclude the courts from admitting evidence that would significantly encourage (or fail to deter) future invasions of constitutional rights. *Ibid.* But, as the Court said in *Michigan* v. *Tucker*, 417 U.S. 433, 450, n. 25, the rationale of judicial integrity does not furnish "an independent basis for excluding challenged evidence." See also *United States* v. *Peltier*, 422 U.S. 531, 536–539; *United States* v. *Calandra*, 414 U.S. 338, 355–356, n. 11.

of contexts in which the deterrent effect of exclusion does not outweigh the cost to society that would result from excluding the evidence. For example, in *Calandra* the Court declined to prohibit the government from asking a grand jury witness questions based on information obtained in an illegal search. The Court observed that such an "extention of the exclusionary rule would seriously impede the grand jury" and stated that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best" (414 U.S. at 349, 351). And in *Janis* the Court declined to apply the exclusionary rule to bar evidence illegally seized by a state officer from admission in a federal civil tax proceeding, reasoning that "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation" (428 U.S. at 453–454). On the one hand, the Court found that enforcement of the tax laws "would be hampered by so extending the exclusionary rule" (*id.* at 447). On the other hand, the Court regarded an extension of the rule to civil tax proceedings brought by another sovereign as likely to have little marginal deterrent effect, reasoning that such misconduct as would not be deterred by the suppression of any unlawfully seized evidence in both state and federal criminal proceedings was unlikely to be deterred by the added sanction of exclusion in a civil tax case. On this bal-

ance of the competing interests, the Court viewed an extension of the exclusionary rule to be "an unjustifiably drastic action by the courts in the pursuit of what is an undesired and undesirable supervisory role over police officers" (*id.* at 458). Similarly in *Michigan* v. *Tucker,* 417 U.S. 433, the Court held that the exclusionary principle of *Miranda* v. *Arizona,* 384 U.S. 436, did not apply to bar the testimony of a witness who was identified by the defendant in the course of questioning that followed inadequate warnings, in part on the ground that the "deterrent effect on future police conduct [of] the exclusion of [the defendant's] statements * * * would [not] be significantly augmented by excluding the testimony of the witness * * * as well" (417 U.S. at 448).[10]

In each of the foregoing cases, the Court recognized the dispositive factor to be the degree of additional deterrence that suppression could be expected to provide in the particular circumstances. In each case, the Court concluded that, in view of the fact that the exclusionary rule already required suppression in other contexts, suppression in the circumstances presented, on the basis of the same police conduct, would

[10] A similar analysis underlies decisions declining to apply the exclusionary rule retroactively (see, *e.g.*, *United States* v. *Peltier*, *supra*, 422 U.S. at 536–539, 542; *Desist* v. *United States*, 394 U.S. 244, 249–251, 254, n. 24; *Linkletter* v. *Walker*, 381 U.S. 618, 636–637) and denying standing to persons who were not themselves the victim of unconstitutional searches (see, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 229; *Alderman* v. *United States*, 394 U.S. 165, 174–175; *Wong Sun* v. *United States*, 371 U.S. 471, 492).

not provide sufficient additional deterrence to outweigh the substantial societal costs of exclusion.

Those principles are fully applicable to this case. The question here is whether suppression of the fruits of a search in a prosecution for a crime committed after the search would provide sufficient additional deterrence of police misconduct to outweigh the harm resulting from exclusion. We submit that it clearly does not; indeed, there are few circumstances in which suppression could have less of a deterrent effect.

There is no question in this case that the evidence discovered in Officer Biro's search cannot be used in any prosecution of respondent for substantive gambling offenses or any other offenses, committed by respondent before the search.[11] By virtue of this fact, the exclusionary rule has served as well as it can its principal objective of removing the incentive of police officers to engage in similar searches.[12]

However zealous police may be, the cases are surely rare in which they would have any substantial incentive to search illegally for evidence of crimes that have not yet been, and may never be, committed. Accordingly, suppression of evidence in a prosecution for a

[11] Whether the testimony of Lois Hennessey could be used in such a prosecution is another question, which we address in Part II, *infra*.

[12] How effectively the rule has achieved the objective of deterring police misconduct is, of course, a matter of considerable controversy.

crime committed after the search is likely to have little effect on police conduct. Officers who will not be deterred by the prospect that an illegal search will substantially jeopardize the prosecution of a crime that has already been committed are most unlikely to stay their hand at the thought that any evidence they find might also be inadmissible in the event the target of their search subsequently commits a crime as to which the evidence is relevant.[13]

Indeed, the potential for deterrence is significantly less here than in other circumstances in which this Court has declined to apply the exclusionary rule. In every case so far considered by the Court, the evidence sought to be used pertained to offenses committed before the search took place, and there was at least some basis for arguing that police would retain considerable motive for seeking evidence by improper means if they knew that, even though the evidence could not be used directly in a prosecution for those offenses, it could be used effectively against the offender in other ways. Thus, for example, in *United States* v. *Janis, supra,* 428 U.S. at 463, Mr. Justice Stewart, dissenting, expressed concern that failure to suppress evidence illegally seized by state officers in a federal civil tax case would encourage state officers

[13] If deterrence plays any part in that situation, it would act on the criminal. If the victim of a search knows that evidence seized in a search may be used against him with respect to future crimes, he may well be deterred from committing those crimes.

to "crack down on gambling law violators by the simple expedient of violating their constitutional rights and turning illegally seized evidence over to Internal Revenue Service agents * * *." [14] Here there is no basis for even that kind of concern. With respect to crimes not yet committed, police officers have no basis for supposing with any degree of confidence that the evidence they obtain can ever be used against the subject of the search under any circumstances. All they can know for certain is that an illegal search may jeopardize the prosecution of crimes that have already been committed.

On the other side of the balance, the negligible deterrent effect in these circumstances would be purchased at a high cost to society. This Court has often noted that in any case in which probative evidence is excluded, the suppression of evidence significantly impairs society's ability to enforce its criminal laws. In many cases, including this one, suppression prevents enforcement altogether. Furthermore, in some cases, the suppression of evidence in the prosecution of crimes committed after the police misconduct may have a special consequence in addition to those often noted in the ordinary case, by providing the target of the search with some greater assurance that his commission of a subsequent crime to which the evidence

[14] See also *Oregon* v. *Hass*, 420 U.S. 714, 724–726 (Mr. Justice Brennan, joined by Mr. Justice Marshall, dissenting); *Harris* v. *New York*, 401 U.S. 222, 232 (Mr. Justice Brennan, joined by Mr. Justice Douglas and Mr. Justice Marshall, dissenting).

was relevant would go unpunished—that is, providing him with some degree of license to commit crimes in the future.[15] In sum, the virtually non-existent

[15] Although apparently not critical to its decision, the court below noted that respondent was unaware of the prior search when he testified and lied to the grand jury (Pet. App. 14a). While there is no doubt something especially offensive about crimes committed in reliance upon an expectation that the exclusionary rule will prevent their successful prosecution—and while we do not dispute the court of appeals' finding that this is not such a case—the decision whether to apply the exclusionary rule to this class of cases should not depend upon the presence or absence of exploitation of this sort in the particular case, because the factor is wholly unpredictable at the time of the search and thus could not possibly influence police behavior. See pp. 21–22, *infra*.

Whether suppression in the prosecution of subsequently committed crimes would in fact encourage crime to any significant extent is perforce speculative, although with respect to the subsequent crime of perjury, it is not improbable and has been suggested by this Court. See, *e.g.*, *Oregon* v. *Haas*, 420 U.S. 714, 722 ("The shield provided by *Miranda* is not to be perverted to a license to testify * * * perjuriously * * *"). But the effectiveness of the exclusionary rule depends not only on its impact on police and criminal conduct but also in large part upon the public's acceptance of the rationality of the rule's foundations. Thus, in *Stone* v. *Powell*, *supra*, 428 U.S. at 490–491, the Court emphasized that the rule must reflect "the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately[,] it may well have the opposite effect of generating disrespect for the law and administration of justice [footnote omitted]." In short, apart from its actual impact on criminal behavior, it would certainly offend common sense notions of proportionality if the exclusionary rule were extended to provide that the target of an unlawful search could thereafter commit a crime without risk that evidence disclosed in that search, or its fruits, could be used against him.

marginal deterrent effect of suppression on police misconduct from application of the exclusionary rule in these circumstances surely does not justify the substantial cost to society that would result.

2. Although the issue of the application of the exclusionary rule to subsequent crimes has not often arisen, the decision below is the only one we are aware of in which the court held the rule applicable to crimes committed after the search. Three circuits have ruled the other way In *United States* v. *Turk*, 526 F. 2d 654 (C.A. 5), certiorari denied, 429 U.S. 823, and *United States* v. *Raftery*, 534 F. 2d 854 (C.A. 9), certiorari denied, 429 U.S. 862, the courts held that the rule does not require the suppression of illegally seized evidence in prosecutions for perjury committed after the search, reasoning that the marginal deterrent effect of suppression in those circumstances is minimal and does not outweigh the substantial public interest in preventing perjured testimony. Following the reasoning of those decisions, the Seventh Circuit held in *United States* v. *Paepke*, 550 F. 2d 385 (decided after the decision below), that the exclusionary rule did not apply to bar the admission of tangible evidence, discovered as the result of an illegal search in 1971, in a federal prosecution charging the defendant with having willfully understated his gross income and having misrepresented its source in a tax return filed by the defendant in 1972. The court concluded that it was

clearly unforeseeable to the police officers conducting the unlawful search that the defendant would subsequently commit tax fraud and that accordingly "any additional deterrent effect resulting from the exclusion of the evidence is outweighed by the necessity of preserving the self-reporting system of the United States tax structure." *Id.* at 393.

In contrast to those decisions, the court below mechanically applied the exclusionary rule without consideration of its policies, stating merely that "we do not understand the government's position to be the law" (Pet. App. 14a). Although the court also observed that the defendants in *Turk* and *Raftery*, unlike respondent, were aware of the illegal searches when they testified falsely, any distinction on that basis is unsound.[16] While we agree that it would be particularly outrageous to permit a person to commit a crime in the conscious expectation that the exclusionary rule will protect him from punishment, a defendant's ignorance of a prior illegal search provides no basis for applying the rule to crimes committed after the search. The purpose of the exclusionary rule is to deter police misconduct, not to reward criminals (*United States* v. *Calandra, supra*, 414 U.S. at 347–348). Whether a person subsequently becomes aware that he was the target of an illegal search can have no relevance to the prior decision of

[16] It is not clear from the opinion whether the court intended to limit its holding in that respect (see Pet. App. 14a).

the police to conduct the search.[17] Moreover, in many cases it may not be possible to prove whether the defendant knew of a prior illegal search, and the application of the exclusionary rule should not turn on the fortuities of proof available to show the defendant's knowledge of a fact.[18]

[17] It could perhaps be argued that police may speculate that a target will not become aware of a search and will subsequently lie about the evidence disclosed in the search when he is subpoenaed by a grand jury, and that the police will thus be encouraged to conduct illegal searches in order to trap suspects into committing perjury. Such speculation is extremely farfetched and certainly does not support a general rule requiring suppression in connection with subsequent crimes. In order for police to have a significant incentive in that respect, they would have to proceed upon the dubious assumption that all of the following conditions would be met: that they will discover incriminating evidence; that the target of the search will remain unaware of the search; that he will be subpoenaed to testify; that he will testify falsely rather than tell the truth or assert his Fifth Amendment privilege; and that the evidence discovered will be sufficient to prove his perjury. And against that speculation, of course, will stand the likelihood that whatever probative evidence they discovered could not be used against the target of the search for any crimes that have already been committed.

Such concerns, it may be noted, have no application to circumstances like the present case, where the officer conducting the search was unaware that respondent was engaged in illegal activity or that he had been under investigation.

[18] If the court of appeals' distinction is based on some notion that witnesses should not be able to take advantage of the rule by lying boldly in the expectation that the government, though aware of the lie, will not be able to prove it, then the government should have to prove not only that the witness knew of the search, but also that he "knew" it was illegal, and further, that he would have standing to assert its illegality. Unless a court happened to have ruled squarely on those issues and that ruling was not subject to later reversal on appeal or collaterally in another jurisdiction, it is difficult to see how the government could prove a witness "knew" something that constitutes a legal conclusion, and, further, a conclusion that may not be finally established until years after the fact.

In short, the court below erred when it applied the exclusionary rule to a situation in which its deterrent effect is minimal and the corresponding costs to the public are substantial. As this Court noted in *Nardone* v. *United States,* 308 U.S. 338, 340: "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." See also *Lopez* v. *United States,* 373 U.S. 427, 440. And in the words of Chief Justice Burger, "[t]o vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention—and surely its *extension*—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law." *Stone* v. *Powell, supra,* 428 U.S. at 499–500 (Burger, *C. J.*, concurring) (emphasis in original). In our view, that showing cannot be made where evidence is sought to be excluded in the prosecution of a crime committed after the search.

3. While one must recognize that in some circumstances police might conduct a search for the specific purpose of discovering evidence of a yet-

to-be committed crime, and in which the exclusionary rule might serve some useful purpose, those instances are surely rare. But this case affords no occasion to consider whether the exclusionary rule would *ever* be appropriate in connection with subsequent crimes, because the facts furnish no basis for concluding that the search here was for such a purpose or that application of the rule would provide any marginal deterrence in these or similar circumstances.

The evidence in this case was undisputed that when Officer Biro looked in the envelope in respondent's shop he was not aware that the shop had been investigated for gambling a year before or that Hennessey was giving envelopes with policy wagers to Millow or anyone else—let alone that respondent might be called before a grand jury months later. It is clear, therefore, that Biro could not have been motivated to conduct the search by the hope of discovering tangible evidence or a witness that could provide proof of respondent's subsequent perjury. The usefulness of Hennessey as a witness at a later prosecution for perjury was the result of mere happenstance, and fell well "outside the offending officer's zone of primary interest." *United States* v. *Janis, supra,* 428 U.S. at 458. The connection between the search of the envelope and the testimony of the witness at respondent's later prosecution for perjury is so indirect and attenuated that reliance on the deterrence rationale in these circumstances would be illusory and capricious. As in *Stone* v. *Powell, supra,* 428 U.S. at 491, the disparity between the police officer's conduct and the windfall to the defendant by the suppression of the testimony, rather than "nurturing * * * respect for Fourth Amendment values * * * may well have the opposite effect of generating disrespect for the law and administration of justice."

B. THE EXCLUSIONARY RULE SHOULD NOT APPLY IN ANY EVENT TO THE SUBSEQUENT CRIME OF PERJURY

We have argued in the preceding section that the exclusionary rule would ordinarily serve no useful purpose when applied at trials for subsequently-committed crimes, regardless of the character of those crimes. But even if it were thought that the rule might have a meaningful function in the case of some subsequently committed crimes, it should have no place when the subsequent offense is perjury. Perjury directly undermines the administration of justice itself, and accordingly this Court has consistently rejected defenses to the charge based on allegations of prior improper acts by the government. Moreover, to apply the exclusionary rule in cases of grand jury perjury would effectively subvert this Court's decision in *United States* v. *Calandra, supra.*

1. This Court has never excused perjury on the grounds of antecedent misconduct of the government or even on the ground that the witness's very obligation to answer the question violated his constitutional rights. Thus, in *Bryson* v. *United States,* 396 U.S. 64, this Court affirmed a conviction for making false

statements in an affidavit required to be made by a statute, rejecting as irrelevant the defendant's contention that the statutory requirement was unconstitutional. The Court stated (*id.* at 72):

> [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently to a question that the Govment should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood [footnote omitted].[19]

In accordance with those principles, the Court recently held that grand jury witnesses prosecuted for perjury could not obtain suppression of their allegedly false grand jury testimony on the ground that they had not been adequately informed of their Fifth Amendment privilege against self-incrimination. *United States* v. *Wong,* No. 74–635, decided May 23, 1977; *United States* v. *Mandujano,* 425 U.S. 564. As the Court stated in *Wong* (slip op. 4), "the Fifth Amendment privilege does not condone perjury. It grants a privilege to remain silent without risking contempt, but it 'does not endow the person who testi-

[19] See also *United States* v. *Knox*, 396 U.S. 77, where the Court held that even where a statute compels a person to provide incriminating information in violation of his Fifth Amendment rights, the person may be punished for committing perjury in response to the compulsion.

fies with a license to commit perjury.' *Glickstein* v. *United States,* 222 U.S. 139, 142 (1911)."[20]

Although this Court has not hitherto had occasion to consider the use of illegally obtained evidence directly in the prosecution of subsequently committed perjury, it has for many years been the rule, on a rationale like that of the cases just discussed, that such evidence may be used to rebut the false testimony of a defendant in a trial on other charges. See *Walder* v. *United States,* 347 U.S. 62. Similarly in *Harris* v. *New York,* 401 U.S. 222, 225, the Court permitted the government to use the defendant's statements, obtained without adequate *Miranda* warnings, to impeach the defendant's inconsistent testimony at trial, stating that "[the Fifth Amendment] privilege cannot be construed to include the right to commit perjury." See also *Oregon* v. *Hass,* 420 U.S. 714, 722.

Although those cases dealt with the use of evidence for impeachment, their principles should control the issue here. The proposition that illegally obtained evi-

[20] While the foregoing cases considered defenses to perjury based on alleged Bill of Attainder Clause or Fifth Amendment violations, their rationale should apply with even greater force to antecedent Fourth Amendment violations, where the perjurer's defense is not that the questions themselves directly violated his constitutional rights but rather that proof of his perjury should be precluded by a judicially created prophylatic rule that was designed to promote official compliance with the Fourth Amendment, not to create "a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, *supra*, 414 U.S. at 348.

243-284—77——3

dence can be used to impeach subsequent perjury but not to punish it directly would largely vitiate the principle that antecedent constitutional violations do not provide a witness with a "right to commit perjury", since in many cases a witness could in fact lie without significant risk of punishment for perjury. But this Court has made clear that respondent had no such right. He could have answered the questions truthfully or refused to answer them at all. But, like the defendants in other perjury cases considered by this Court, he had no right to "knowingly and willfully answer with a falsehood." *Bryson, supra,* 396 U.S. at 72.[21]

2. The foregoing considerations apply with special force to perjured grand jury testimony. Indeed the exclusion of evidence obtained in a search from the prosecution of subsequent perjury before a grand jury would largely nullify the decision in *United States* v. *Calandra, supra,* where the Court held that the imperatives of grand jury proceedings precluded any right on the part of a witness to refuse to answer questions based on evidence obtained in violation of the Fourth Amendment.

[21] There is, in any event, little basis for distinguishing the use of evidence for impeachment and its use to prosecute directly for perjury. In both situations the evidence is used against subsequent perjury, and its use is necessary to protect the judicial process from false testimony. Moreover, the evidence may well be as damaging to the defendant when used for impeachment as when used directly to prosecute for perjury. See *Stone* v. *Powell, supra,* 428 U.S. at 485.

In *Calandra,* the Court reaffirmed the "special role [of the grand jury] in insuring fair and effective law enforcement" and stated that "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." 414 U.S. at 343, 344. The Court also noted that "[t]he duty to testify has long been recognized as a basic obligation that every citizen owes his Government," and that that duty is "particularly applicable to grand jury proceedings." *Id.* at 345, quoting from *Branzburg* v. *Hayes,* 408 U.S. 665, 688. The Court concluded that "allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties." 414 U.S. at 350.

Certainly the duty to testify and to respond to questions based on improperly obtained evidence necessarily implies the duty to testify truthfully. But to contend that a witness may nevertheless lie in response to such questions without risk that the same evidence could be used to punish his lie would make a mockery of the commands of *Calandra* and render that decision largely ineffectual. Surely false testimony interferes with the grand jury's effective discharge of its duties at least as much as the witness's refusal to testify at all.[22]

[22] *Calandra*, of course, was based not only on the grand jury's need for broad investigative powers requiring its consideration of probative evidence regardless of its source, but also on the disruption of its functions that would follow from litigation of a wit-

II. THE COURT BELOW ERRED IN CONCLUDING THAT THE TRIAL TESTIMONY OF LOIS HENNESSEY SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF AN ILLEGAL SEARCH

This case squarely presents another issue as important to the administration of justice, and far more common, than the application of the exclusionary rule to subsequent crimes—namely, whether all of the trial testimony of a witness whose possession of relevant information was discovered as the result of an illegal search should be suppressed as the fruit of that search. On previous occasions, when the issue was not briefed, this Court has reserved decision on it (*e.g.*, *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 876, n. 2; *Harrison* v. *United States,* 392 U.S. 219, 223, n. 9), and, as Judge Van Graafeiland noted in his dissent below (Pet. App. 17a, n. 3), there is a "marked difference" of opinion among the courts of appeals on the question.

The question whether all of a witness's testimony should be suppressed as the fruit of police misconduct poses considerable analytical difficulty. On the one hand, common sense and many courts resist the proposition that a witness, and all that that witness knows

ness's invocation of the exclusionary rule to resist answering questions. 414 U.S. at 350. While the application of the exclusionary rule in a subsequent prosecution for perjury does not threaten the kind of delay considered in *Calandra*, the ability of a witness to lie to the grand jury without significant risk of punishment for the lie threatens the functioning of the grand jury at least as much as a witness's invocation of the exclusionary rule in refusing to answer questions at all.

about relevant events, should be entirely suppressed when knowledge of the witness's potential utility is the fruit of some police misconduct.[23] On the other hand, given that physical evidence derived from an illegal search is subject to exclusion, it is not readily apparent why information inside a witness's head should be treated differently.

The court below was unwilling to recognize any difference. It affirmed the suppression of Hennessey's testimony concerning her personal knowledge of respondent's gambling activities because "the road to Miss Henness[e]y's testimony * * * is both straight and uninterrupted * * *" (Pet. App. 13a). We submit that the court erred in failing to distinguish live-witness testimony from other kinds of evidentiary fruits. We submit that fundamental policies underlying the exclusionary rule, particularly as identified in this Court's decisions concerning the attenuation of tainted evidence, warrant the admission of that kind of testimony.

We proceed first to set forth what we perceive to be the appropriate frame of analysis and, second, to apply that analysis to the relevant similarities and differences between the testimonial evidence such as that involved in this case and other kinds of evidentiary fruits.

[23] See Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. Rev. 32 (1967) (hereinafter "Ruffin"); *Smith* v. *United States*, 324 F. 2d 879, 881–882, n. 2 (C.A.D.C.), certiorari denied, 377 U.S. 954.

A. THE ISSUE OF ADMISSIBILITY OF LIVE-WITNESS TESTIMONY ALLEGED TO BE THE FRUIT OF AN ILLEGAL SEARCH SHOULD BE RESOLVED ON THE BASIS OF EXCLUSIONARY RULE POLICY RATHER THAN THE CASE-BY-CASE ATTENUATION ANALYSIS APPLIED TO PHYSICAL EVIDENCE AND CONFESSIONS

1. The evolution of traditional fruits/attenuation analysis

The fruits doctrine, although perhaps implicit in the exclusionary rule established in *Weeks* v. *United States,* 232 U.S. 383, was first applied by this court in *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, where the government had discovered documents in the course of an unlawful search and seizure and then sought to use its knowledge of the existence of the documents to compel the defendants to produce the documents under a subpoena. In those circumstances, Justice Holmes stated that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all" (*id.* at 392).[24] He went on to observe, however, that facts that have been unlawfully discovered do not necessarily "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others * * *" (*ibid.*).

Justice Holmes' broad statement was made in connection with a rather obvious and direct application of the fruits doctrine, and this Court has since made

[24] For the extent to which Justice Holmes' statement continues to apply to grand jury proceedings, see *United States* v. *Calandra, supra,* 441 U.S. at 352, n. 8.

clear that at some point on a chain of evidence that may be said to have its origins in some police misconduct, public policy requires that the exclusionary rule cease to apply.[25] Thus in *Nardone* v. *United States,* 308 U.S. 338, the defendant contended that the evidence introduced against him at trial had been derived from an illegal wiretap. Although the Court remanded to permit the defendant an opportunity to prove that claim, it stressed that the degree to which derivative evidence should be suppressed depends upon a proper accommodation between "two opposing concerns * * *: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws * * *" (*id.* at 340). Significantly, Mr. Justice Frankfurter went on to state (*id.* at 341):

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such a connection may have become so attenuated as to dissipate the taint.[26]

[25] Principles of attentuation are separate and distinct from the principles of independent source referred to in *Silverthorne,* although the cases sometimes blur the distinction. The principle that derivative evidence can be so remote from the primary illegality to dissipate the taint presupposes that the evidence is not, strictly speaking, "independent source" evidence; rather it is evidence that comes to light through a causal chain tracing back to the illegality.

[26] On remand the court of appeals affirmed the district court's findings that the evidence had not been derived from the illegal

The attenuation principle has been applied to verbal as well as physical fruits, and the relevant considerations have been most thoroughly expounded in *Wong Sun* v. *United States,* 371 U.S. 471, and *Brown* v. *Illinois,* 422 U.S. 591. In *Wong Sun* the Court held that statements by defendant Toy concerning the location of narcotics and his role in their sale, which were made shortly after his illegal arrest, were the "direct result" of the arrest. The Court held that the statements should have been suppressed as against Toy because "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence" and because under the circumstances it was "unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion"[7] (371 U.S. at 486). The Court also held that narcotics dis-

wiretaps or other illegally seized evidence, *United States* v. *Nardone,* 127 F. 2d 521 (C.A. 2), certiorari denied, 316 U.S. 698. While the evidence established that wiretaps and other tainted evidence had persuaded the federal agents that the defendant was implicated in a crime and thus provided the impetus for the investigation and eventual prosecution, Judge Hand emphatically rejected the proposition that "a prosecution must show, not only that it has not used any information illicitly obtained * * * but that the information has not itself spurred the authorities to press an investigation which they might otherwise have dropped" (127 F. 2d at 523). That conclusion is pertinent to the similar circumstances of the case at bar. See discussion, *infra,* pp. 56–57, n. 50.

[7] The Court held, however, that neither the statements nor their fruits should be suppressed in the case against Wong Sun, since his rights were not infringed by Toy's arrest. 371 U.S. at 492.

covered as a result of those statements should have been suppressed, but it stated (*id.* at 487–488):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." * * *

The Court applied those principles to conclude that the confession of Wong Sun, made several days after his illegal arrest, should not be suppressed: "On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'because so attenuated as to dissipate the taint.' *Nardone* v. *United States,* 308 U.S. 338, 341" (371 U.S. at 491).

In *Brown* v. *Illinois, supra,* the Court reaffirmed those principles in the case of a defendant who made incriminating statements several hours following his illegal arrest and after he had been given *Miranda* warnings. The Court concluded that although the statements may have been voluntary and obtained in compliance with *Miranda* requirements, they were not "sufficiently a product of free will to break, for

Fourth Amendment purposes, the causal connection between the illegality and the confession." 422 U.S. at 603. In reaching that conclusion, the Court in *Brown* significantly refined the *Wong Sun* analysis by identifying a number of factors relevant to determining whether verbal evidence is sufficiently attenuated to purge the primary taint (*id.* at 603–604; footnotes and citations omitted):

> No single factor is dispositive. • • • The *Miranda* warnings are an important factor • • •. The temporal proximity of the arrest and the confession, the presence of intervening circumstances • • •, and particularly, the purpose and flagrancy of the official misconduct are all relevant.

2. The case-by-case attenuation analysis of Wong Sun *and* Brown *provides unsatisfactory results when applied to live-witness testimony*

Although *Wong Sun* and *Brown* did not deal with the trial testimony of a witness, the courts of appeals have generally applied the same analysis and considered the kinds of factors identified in *Brown* in deciding whether to suppress the trial testimony of a witness whose identity or possession of relevant information first came to light as the result of some police misconduct.[28] Following the approach of *Wong*

[28] See *United States* v. *Scios*, C.A.D.C., No. 75–1619, decided August 23, 1976, pending on rehearing *en banc*; *Brown* v. *United States*, 375 F. 2d 310 (C.A.D.C.), certiorari denied, 388 U.S. 915; *Smith* v. *United States*, 344 F. 2d 545 (C.A.D.C.); *Edwards* v. *United States*, 330 F. 2d 849 (C.A.D.C.); *McLindon* v. *United States*, 329 F. 2d 238 (C.A.D.C.); *Smith* v. *United States*, 324 F.

Sun and *Brown*, the inquiry in these cases has tended primarily to focus, with varying emphasis, on such concepts as causal relationship, intervening act of free will, exploitation, and the temporal proximity between the primary illegality and the testimony.

We beli however, that there are significant limitations to a g live-witness testimony primarily in those terms on a case-by-case basis—limitations that are reflected in the pattern of inconsistent decisions of the courts of appeals and that have added unnecessary burdens and uncertainties to the administration of justice. Concepts of causation and inter-

2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954; *United States* v. *Marder*, 474 F. 2d 1192 (C.A. 5); *Parker* v. *Estelle*, 498 F. 2d 625 (C.A. 6), certiorari denied, 421 U.S. 963; *United States* v. *Crouch*, 528 F. 2d 625 (C.A. 7), certiorari denied, 429 U.S. 900; *United States* v. *Hoffman*, 385 F. 2d 501 (C.A. 7), certiorari denied, 390 U.S. 1031; *United States* v. *Evans*, 454 F. 2d 813 (C.A. 8), certiorari denied, 406 U.S. 969; *United States* v. *Beasely*, 485 F. 2d 60 (C.A. 10), certiorari denied, 416 US. 941; see also *Lockridge* v. *Superior Court*, 3 Cal. 3d 166, 474 P. 2d 683 (Sup. Ct.), certiorari denied, 402 U.S. 910; cf. *United States* v. *Karathanos*, 531 F. 2d 26 (C.A. 2), certiorari denied, 428 U.S. 910; *United States* v. *Tane*, 329 F. 2d 848, 853 (C.A. 2); *People* v. *Scharfstein*, 52 Misc. 2d 976, 277 N.Y.S. 2d 516 (Sup. Ct.).

Some courts, however, like the court below, have simply applied the exclusionary rule mechanically to suppress testimony whenever it could be said that the testimony might not have been given but for the primary illegality. See *United States* v. *Guana-Sanchez*, 484 F. 2d 590 (C.A. 7), certiorari granted, 417 U.S. 967, certiorari dismissed as improvidently granted, 420 U.S. 513; *Williams* v. *United States*, 382 F. 2d 48 (C.A. 5); *United States* v. *Alston*, 311 F. Supp. 296 (D. D.C.); *People* v. *Dannic*, 52 Misc. 2d 1012, 277 N.Y.S. 2d 331 (Sup Ct.); cf. *United States* v. *Karathanos*, *supra*; *United States* v. *Tane*, *supra*.

vening acts function adequately with respect to physical and even non-testimonial verbal fruits by serving as an understandable and relatively practical means of implementing underlying exclusionary rule policies. However, as we shall discuss, they break down and produce anomalous results when applied to live-witness testimony, primarily because of the inevitable intrusion of a complex of "intervening causes" that are usually referred to loosely as the witness's "free will." Accordingly we suggest that the proper focus of the inquiry should be directly upon the policies of the exclusionary rule and on the question whether as a matter of policy the deterrence benefits of exclusion of live-witness testimony justify its social cost."

A. Causation and volition

With respect to the question of live-witness testimony, the concepts of causation and volition do not significantly advance the inquiry because, in the final analysis, those concepts rest on philosophical and linguistic assumptions that are not capable of objective resolution and that are susceptible to manipulation to reach almost any desired result. If causation alone were determinative of whether an item of evidence is to be excluded, and if "cause" is given one of its philosophically acceptable and commonly understood meanings as an event that is a necessary (although perhaps not sufficient in itself) condition of a subse-

[29] To the extent that the analysis and factors of *Wong Sun* and *Brown* are properly applicable to the question of Hennessey's testimony, they would clearly dictate its admission, as we discuss in Part II (D), *infra*, pp. 61–62.

quent event,[30] then there would be no attenuation doctrine at all; however remote from the primary illegality, the evidence would be excluded if it could be traced along the chain of evidence to the original sin.[31] To refine the concept with such terms as "direct result," "proximate cause," "intervening cause" and "breaks in the causal chain" does not significantly assist the inquiry. To pose the question concretely, was Hennessey's testimony more "proximately" the result of Officer Biro's search or of the "intervening causes" of Agent Emory's decision (which he might have made even without the search) to interview her and of her decision to testify (which she might in any event have volunteered to do)? Philosophers would probably differ. And as this case illustrates, so long as the inquiry is cast in those terms, rational judges will continue to reach equally plausible but contrary conclusions.[32]

[30] See Hume, *An Essay on Human Understanding*, § VII (1748). See also Prosser, *Law of Torts*, § 41, p. 239 (4th ed. 1971). One commentator on the exclusionary rule as it relates to witnesses states "What is demanded is that there be identified not simply the necessary or sufficient conditions, but *the* cause, the 'proximate' or 'efficient' or 'responsible' cause—the force that 'activated' or 'compelled' the result * * *." Ruffin, *supra*, 15 U.C.L.A. L. Rev. at 34. As noted above, Ruffin's understanding of cause does not assist in determining whether a witness's testimony derived from a complex of causes should be excluded.

[31] As Prosser observes: "It should be quite obvious that, once events are set in motion, there is, in terms of causation alone, no place to stop." Prosser, *supra*, § 41, p. 239.

[32] Principles of proximate causation are deeply rooted in common notions of justice and play a significant role in our civil and criminal law. However, their role is primarily negative, in excusing individuals from responsibility for consequences they cannot be

On the other hand, if notions of free will were significantly determinative of the question of admissibility of witness testimony, there would be little left of the exclusionary rule. It would be a rare case in which a prosecutor could not find a police officer who, with as much free will as could ever be required to "break the causal chain," would be willing to testify to exactly what he discovered in the course of an unlawful search or interrogation.[32a] Apart from that obvious problem, resort to "free will" analysis with respect to the more difficult question of the third-party witness has resulted in diametrically opposed results among lower court decisions, each on the basis of a rationale largely irrelevant to the policies of the exclusionary rule. Some courts have admitted a witness's testimony on the basis of evidence that the witness was willing from the outset to testify and that the resulting testimony was therefore the product of the witness's intervening act of free will.[33] Other

said to have proximately caused, although their acts may have established the necessary condition. If a person invites another for dinner, and the guest is run down by a reckless driver on the way to the engagement, we do not hold the first person responsible for wrongful death or murder. Similarly we do not hold police officers responsible for Wong Sun's confession, although he may not have confessed but for their illegal acts several days before. See also *United States* v. *Bayer*, 331 U.S. 532, 540.

[32a] As we indicate below, p. 49, we believe that kind of testimony should not be admissible. Our point is simply that whether testimony of that kind should be admitted can only be answered with reference to the deterrence policies of the exclusionary rule; it cannot be answered with reference to the degree of the witness's free will in giving the testimony. It should also be emphasized that this case does not involve that kind of testimony.

[33] *E.g.*, *McLindon* v. *United States; People* v. *Scharfstein;* cf.

courts, however, have found evidence of the witness's free will in the fact that the witness was originally resistent to testifying but subsequently changed his mind, as the result, for example, of prosecutorial grants of immunity.[34] Still other courts have concluded that the witness lacked free will on the basis of the same kind of evidence—that is, pressures or inducements by the prosecution to testify.[35] Those disparities have led one leading commentator on the subject to state, correctly in our view, that resort to free will analysis has enabled at least one court—

> to resolve the taint issue in any way it saw fit simply through manipulation of mentalistic entities. Something in the record on appeal could usually be found to show the workings or non-workings of the will consistently with some preconceived notion of how the issue should be decided.[36]

Lockridge v. *Superior Court;* but see *Smith* v. *United States* (testimony excluded because the witness's story remained unchanged), all cited at n. 28, *supra.*

[34] *E.g.*, *United States* v. *Scios; United States* v. *Marder; Smith* v. *United States; Edwards* v. *United States; Parker* v. *Estelle; United States* v. *Hoffman; United States* v. *Evans; United States* v. *Beasely*, all cited at n. 28, *supra.*

[35] *United States* v. *Karathanos; United States* v. *Tane; Brown* v. *United States; Smith* v. *United States*, all cited at n. 28, *supra.*

[36] Ruffin, *supra*, 15 U.C.L.A. L. Rev. at 52. Ruffin concluded that "the will and volition concepts as employed in the *Smith & Bowden* line of cases are spurious and unnecessary, and can be manipulated, whatever the facts or merits of the case, to justify any decision deemed a priori desirable." *Id.* at 64.

We agree. Like causation, the concept of volition rests on murky philosophical premises and is of limited utility in judicial analysis. Individuals decide to testify or to make statements as the result of a complex of pressures, some internally generated (*e.g.*, desires

See also *United States* v. *Alston*, 311 F. Supp. 296 (D. D.C.)[37]

B. Exploitation of the illegality

Similarly, the concept of obtaining derivative evidence by "exploitation of [the primary] illegality" set forth in *Wong Sun* and *Brown* v. *Illinois* has limited usefulness in this context unless it is more narrowly defined. To the extent that the concept of "exploitation" focuses upon the question whether the police engaged in the primary illegality for the very purpose of obtaining the evidence in question

to unburden guilt, to gain favor with authority, or to be a good citizen), and some externally generated (*e.g.*, threats of contempt or deportation or promises of leniency). To say that a statement should be suppressed as not sufficiently a product of free will is simply to state the conclusion that the government's contribution to the complex of factors resulting in the statement or testimony is impermissible as a matter of legal or constitutional policy. The inquiry, therefore, should ask whether as a matter of policy it is permissible to put pressure on a witness to testify (*e.g.*, by threat of contempt) or whether suppression of the testimony would significantly deter other constitutional violations—not whether a witness's testimony is some absolute sense a product of free will.

[37] In that case, Judge Gesell, in suppressing a witness's testimony, observed: "Since it appears that the result in 'tainted witness' cases depends more on the particular panel sitting than anything else, there is as yet no clear guidance for the trial court from the Court of Appeals. Accordingly, it is necessary to return to the fundamental theory of the exclusionary rule in disposing this case." 311 F. Supp. at 298. While we agree with Judge Gesell that the question must be resolved with reference to the policies of the exclusionary rule, we disagree with his conclusion that the rule requires the suppression of testimony whenever it can be said that the witness might not have testified but for the illegality.

(as appeared to be the case in *Brown*), then the concept properly relates to the purposes of the exclusionary rule and serves a useful function in connection with live-witness testimony as well as other kinds of evidence (see pp. 60–61, *infra*.). But if exploitation is broadly equivalent to "use" and thus encompasses all circumstances in which, on the basis of information illegally obtained, the government pursues its investigation, follows leads, and ultimately seeks to introduce some derivative evidence, then the concept would swallow up the principle of attenuation. An attempt to introduce any derivative evidence, however remote, could be said to constitute an exploitation of the primary illegality. In sum, "exploitation" in this latter sense is a perjorative term with little descriptive content; it precludes the *improper* use of information without indicating what use is improper.[38]

[38] This concept has also engendered confusion in the courts of appeals, particularly in cases where a witness identified as a result of an illegal search is induced or pressured to testify by the government. As noted above (nn. 34, 35, *supra*), in some cases, the witness's change of attitude has been seen as evidence of an intervening act of will, and the testimony has been admitted, while other cases have reached the opposite conclusion. Ruffin attempts to harmonize those cases on the ground that the former involve the government's exploitation of some secondary illegality, while the latter involve exploitation of the primary illegality—that is, implicitly threatening the witness with prosecution on the basis of the evidence discovered in the illegal search. Ruffin, *supra*, 15 U.C.L.A. L. Rev. at 60–61. Whether the cases bear such analysis is doubtful. See *United States* v. *Scios*, *supra*, n. 28. But if it is permissible (and "nonexploitative") to pressure or induce a witness to testify (*e.g.*, by simple subpoena) on the basis of information lawfully obtained,

c. Temporal proximity

Finally, temporal proximity, another factor identified in *Brown,* is not readily applicable to the question of a witness's trial testimony. If the relevant time frame is the period between the illegality and the witness's decision to supply the useful evidence (*i.e.,* the witness's act of testifying)—as application of *Brown* analysis to this context would suggest [11]—then considerations of temporal proximity would almost always militate in favor of admitting witness testimony, even if the testimony did no more than describe the evidence discovered in the search.

3. A case-by-case attenuation inquiry fails to give proper weight to exclusionary rule policies

In view of the limitations of the analysis suggested in *Wong Sun* and *Brown* as applied to this context,

---

that conduct does not become "exploitative" simply because the information was unlawfully obtained, any more than it would be "exploitative" to prosecute a culpable witness on the basis of tainted evidence that he had no standing to challenge. Whether that witness's testimony should be suppressed depends on the deterrence policies of the exclusionary rule, not whether the means of obtaining the testimony could be called "exploitative."

[11] In *Brown*, the time lapse between the initial unlawful arrest and the confession was regarded as a relevant indicator of whether the confession was the result of an intervening act of free will. In the case of live-witness testimony, the evidence challenged is the testimony of the witness. If temporal proximity is relevant in determining whether that evidence is the product of an intervening act of free will, the relevant period should be between the primary illegality and the witness's exercise of his will in furnishing the evidence.

we submit that the inquiry with respect to live-witness testimony should not be whether, as an *a priori* and philosophical matter, a witness's testimony can be said to have a sufficient causal relationship with the primarily illegality or instead is more "directly" the result of intervening causes. Rather, the inquiry should focus directly on the policies of the exclusionary rule and should consider whether the deterrence benefits of excluding live-witness testimony outweighs the public interest in its admission. That is, rather then deciding each case on the basis of the volitional and causative factors suggested in *Wong Sun* and *Brown,* this Court should determine and declare whether, as a matter of policy, this type of evidence should be admitted or excluded.

This Court has adopted the kind of policy approach that we suggest here in a number of exclusionary rule contexts. Thus, with respect to standing, the Court has established as a matter of policy that evidence shall not be excluded if it was obtained through the violation of the constitutional rights of someone other than the person challenging its admission. That rule is based in large part on the Court's assessment of the deterrence benefits of exclusion in those circumstances generally (see *Alderman* v. *United States,* 394 U.S. 165, 174–175), and the Court has not undertaken to determine whether, in each case, exclusion would in fact have deterred the misconduct. The Court has taken a similar approach to precluding or limiting

the retroactive effect of decisions involving new applications of the exclusionary rule. See *United States* v. *Peltier*, 422 U.S. 531, 536–539.[40]

Moreover, apart from the limitations we have suggested in the utility of the *Wong Sun-Brown* criteria, there are several significant advantages in considering the question of live-witness testimony

[40] We find, in addition, significant support for approaching this inquiry directly in terms of exclusionary rule policy in a number of other decisions of this Court that can be said, at least in a sense, to deal with the consequences of police misconduct. First, in *Frisbie* v. *Collins*, 342 U.S. 519, the Court rejected the contention that a defendant could not be prosecuted for a crime in Michigan after he had been kidnapped in Illinois by Michigan officers and returned to Michigan for prosecution. Although the defendant's constitutional and legal rights had clearly been violated and although prohibiting his prosecution may well have served to deter similar police conduct in the future, the Court did not pause to consider the causal nexus between that conduct and the prosecution, but simply decided as a matter of policy that "a guilty person rightfully convicted * * * [cannot] escape justice because he was brought to trial against his will." 342 U.S. at 522. In our view, the policy considerations against forever tainting a witness on the basis of the means by which that witness was discovered are very similar to the policies against forever tainting jurisdiction over a defendant on the basis of the means by which he was brought to trial.

Second, in *Michigan* v. *Tucker*, 417 U.S. 433, the Court held admissible the trial testimony of a witness whose identity was disclosed by the defendant's statement made after inadequate *Miranda* warnings. Although the defendant's statement itself was not admissible, the Court did not inquire whether the witness's testimony was sufficiently attenuated from the primary illegality in *Wong Sun* or *Brown* terms; rather it simply decided as a matter of exclusionary rule policy that the deterrent effect of the rule would not be "significantly augmented by excluding the testimony of the witness Henderson as well." 417 U.S. at 448.

directly in terms of exclusionary rule policy. First, such an inquiry focuses primarily on the motivations of the police before the fact rather than the motivations of the witness after the fact, and thus relates directly to the purposes of the exclusionary rule.[41] Indeed, while the approach we suggest for cases involving live-witness testimony may be different from that of other fruits and attenuation cases, the underlying principle is the same, as Mr. Justice Powell suggested, concurring in *Brown* (422 U.S. at 610).

> The basic purpose of the [exclusionary] rule, briefly stated, is to remove possible motivations for illegal arrests. Given this purpose, the notion of voluntariness has practical value in deciding whether the rule should apply to statements removed from the immediate circumstances of the illegal arrest. * * * [T]he police normally will not make an illegal arrest in the hopes of eventually obtaining a truly volunteered statement.[42]

[41] See *United States* v. *Guana-Sanchez*, 484 F. 2d 590, 594 (C.A. 7), certiorari granted, 417 U.S. 967, certiorari dismissed as improvidently granted, 420 U.S. 513 (Pell, *J.*, dissenting): "I have some conceptual difficulty in determining how an exclusionary rule designed to control police behavior can be applied on a case-by-case basis as *Smith* [v. *United States*, 344 F. 2d 545 (C.A.D.C.)] would have us do. I am certain that police officers would have an even greater difficulty in determining whether a possible witness's testimony was attenuated from illegality."

[42] See also, *Harrison* v. *United States*, 392 U.S. 219, 231–233 (White, *J.*, dissenting).

Second, the kind of case-by-case determinations suggested in *Wong Sun* and *Brown* add substantial burdens to the administration of criminal justice. As one commentator has observed, resolution of the live-witness problem should reflect "a concern for the limits to which judicial machinery can sustain the time-consuming demands and stresses of solving complex fact problems which are collateral to ultimate questions of fact." Ruffin, *supra*, 15 U.C.L.A. L. Rev. at 78–79. Cf. *United States* v. *Robinson*, 414 U.S. 218, 235.

B. THE POLICIES OF THE EXCLUSIONARY RULE DICTATE THAT LIVE-WITNESS TESTIMONY SHOULD GENERALLY BE ADMITTED EVEN IF IN SOME SENSE IT IS A "FRUIT" OF AN ILLEGAL SEARCH

An inquiry focused directly on the policies of the exclusionary rule requires an identification, on the one hand of the effect of the admission or exclusion of the challenged evidence on the incentives to the police to commit or abstain from a primary illegality, and, on the other, the cost to society of excluding the evidence.[43] We submit that significant differences between live-witness testimony and other kinds of evidentiary "fruits" justify a refusal to extend the exclusionary rule (with certain specific exceptions

[43] Many of the factors discussed in *Wong Sun*, *Brown* and other cases remain relevant to this inquiry. Thus, as we discuss below, the fact that an unpredictable complex of motivations normally go into a witness's decision to testify or not to testify, which in *Wong Sun* terms might be called his free will, are relevant to determining whether the police have a significant incentive to conduct unlawful searches for the purposes of discovering potential witnesses. But what the witness's motivations actually were in a particular case has no bearing on the police's earlier decision to conduct the search (or their decision to conduct similar searches in future cases), and should not determine the exclusionary question.

discussed below) to the testimony of a witness about information known to that witness wholly independently of any police misconduct.

Before proceeding to identify those differences, it is important to specify at the outset what is not involved in our analysis and conclusions—namely, the testimony of a witness that describes illegally seized evidence or fruits of an illegal search that would otherwise be inadmissible under established principles of the exclusionary rules. To the extent that established principles of the exclusionary rule (including fruits, attenuation and independent source analysis) provide necessary deterrence of police misconduct, it is obvious that that deterrence would be substantially undermined if the prosecution could simply use a willing witness to describe otherwise tainted evidence. Our analysis and conclusions are confined to testimony of a witness concerning the witness's knowledge possessed independently of any illegal police conduct.[44]

[44] The distinction we are making here is between the situation in which the testimony of a witness is about facts learned by that witness as a result of an illegal search, which would be treated like any other evidentiary fruit, and that in which the witness

With that exception in mind, and on the basis of the inherent differences between testimonial and other evidentiary fruits discussed below, we submit that this Court should decide as a matter of exclusionary rule policy that the testimony of a witness whose identity or possession of relevant information was discovered as a result of an illegal search or seizure should not be excluded (1) except to the extent it describes other tainted fruits learned by the witness as a result of the misconduct and (2) unless the facts warrant the conclusion that the search was for the specific purpose of discovering potential witnesses.

We first consider the differences between testimonial evidence and other evidence in terms of the incentives of the police to develop such evidence through illegal searches or other misconduct, and we then examine the issue in terms of the cost of exclusion to the administration of justice.

---

testifies to matters wholly independent of what the illegal search may have disclosed, and that testimony is challenged on the ground that governmental awareness of the witness's utility was the fruit of a constitutional violation (which is the present case). An intermediate case could arise in which the witness is testifying about matters disclosed during an illegal search, but on the basis of independent knowledge of that matter (*i.e.*, the witness would have been capable of testifying about the matter even if the search had never occurred). This case does not require the Court to decide how that intermediate situation should be treated, because the trial court excluded from its consideration any evidence concerning the envelope and its contents discovered by Biro (n. 6, *supra*), and because Hennessey did not testify about the contents; indeed, she testified she did not know what was in the envelope (A. 24).

1. A general rule admitting live-witness testimony will not substantially impair the deterrent effect of the exclusionary rule

The extent to which a police officer has an incentive to conduct an illegal search[45] for evidence depends primarily on (1) his expectation, or ability to foresee, that the search will uncover useful evidence and (2) his assessment of the likelihood that what he might discover could be ascertained in other ways. In those respects, the trial testimony of witnesses differs significantly from other kinds of evidentiary fruits.

Consider a typical example. The police suspect that a flower shop is being used as a front for a gambling operation, and they decide to search it surreptitiously to secure evidence of gambling offenses. The police may have the same level of expectation, or ability to foresee, that their search will disclose the identity of a possibly knowledgeable witness (for example, the name of a betting customer) as they have that it will disclose more direct evidence of the offenses (for example, betting slips and other gambling paraphernalia) or other kinds of leads (for example, check books that will lead them to bank accounts).[46] But the very nature of testimonial evidence renders it signif-

---

[45] For convenience, the discussion that follows will be in terms of an illegal search, although the analysis applies equally to other kinds of misconduct, such as improper arrests and interrogations.

[46] Of course in many if not most cases the police do not actually expect or foresee that their search will uncover the particular items of evidence later challenged; rather they are usually motivated by a general expectation that their search will disclose useful evidence of some kind or another.

icantly less probable that the name of a potential witness will eventuate in useful evidence at trial than that any tangible evidence they find will be useful in a prosecution.

That is so because tangible evidence generally "speaks for itself," whereas, as Chief Justice (then Judge) Burger said in *Smith* v. *United States,* 324 F. 2d 879, 881–882 (C.A.D.C.):

> [T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence [footnote omitted].

In our example, the police officers could reasonably expect that if their search uncovers betting slips, that evidence (but for the exclusionary rule) could be used effectively against the target of the search. But if they discover the name of someone who might have relevant information, they still face a long list of uncertainties before that name is translated into useful trial testimony. These include, but are not limited to, whether they can locate the individual; whether he will have useful information; whether he will divulge that information; whether he will remain available to testify at the time of trial; whether, if he is unwilling to testify, the prosecutor will be willing to grant him immunity; and whether, if all of the foregoing uncertainties eventuate favorably, the jury will find him

a credible witness. To those uncertainties must also be added the awareness of experienced police officers and prosecutors that witnesses, even in the best of circumstances, are all too often unwilling to "get involved" in the prosecution of a crime by disclosing information or testifying, either because of the inconvenience entailed, their general animus against law enforcement officers, the unpleasant prospect of exposure to hostile cross examination, or the risk of retaliation.[47] In short, it is unlikely that, in the ordinary case, the prospect of finding a useful witness adds significantly to the incentives of the police to conduct an unlawful search, or, conversely, that exclusion of the testimony of such a witness would significantly augment the existing deterrence provided by the exclusion of other types of evidence and its fruits.

With respect to incentives, it is also appropriate to consider the police officer's assessment of the likeli-

[47] As one student of this problem recently wrote, "Studies in Washington, using the computer-based Prosecutor's Management Information System, show that the chief cause of prosecution failure is that crucial witnesses stop cooperating with the authorities in mid-course." John Stein, *Enlisting Ourselves in the War on Crime*, The Washington Post, July 24, 1977, p. B1. Indeed, the reluctance of many witnesses to testify has compelled the government to establish a program to transfer and furnish new identities to many witnesses who have testified for the government in major prosecutions. Yet in the too infrequent instance of a witness (like Hennessey) who is willing to shoulder the burdens and risks, apparently through the purest motives of civic responsibility, the court below would establish a rule that the testimony cannot be heard.

hood that an item of useful evidence will or can be acquired through means other than unlawful searches. That consideration underlies the "inevitable discovery" exception to the fruits doctrine that the courts of appeals have developed and that applies to tangible as well as verbal and testimonial fruits. Under that doctrine, as summarized by one commentator, "where the court finds that the challenged evidence would have been eventually secured through legal means regardless of the improper official conduct, the inevitable discovery exception allows the evidence to be admitted." Note, *The Inevitable Discovery Exception To The Constitutional Exclusionary Rules*, 74 Colum. L. Rev. 88 (1974).[48] The courts of appeals have applied that doctrine cautiously and have required a strong showing by the government that the evidence would inevitably have been disclosed. On the facts of this case, the two courts below found that Hennessey's testimony would not have been inevitably discovered within the ambit of that doctrine, and we did not seek this Court's review of those findings (see *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635).

[48] See *Brewer* v. *Williams*, No. 76-1263 (March 23, 1977), in which the Court indicated that on retrial the *corpus delicti* "might well be admissible on the theory that the body would have been discovered in any event" (slip op. 18, n. 12). See also *United States* v. *Cole*, 463 F. 2d 163, 171–174 (C.A. 2), certiorari denied, 409 U.S. 942; *United States* v. *Falley*, 489 F. 2d 33 (C.A. 2); *United States* v. *Seohnlein*, 423 F. 2d 1051 (C.A. 4), certiorari denied, 399 U.S. 913; *Killough* v. *United States*, 336 F. 2d 929 (C.A.D.C.); *Wayne* v. *United States*, 318 F. 2d 205 (C.A.D.C.), certiorari denied, 375 U.S. 860.

Nevertheless, the likelihood that an item of evidence can be or will be obtained by legitimate means bears closely on the incentives of the police to engage in unlawful conduct to obtain it. And in that respect a witness's trial testimony again differs significantly from other kinds of evidence. To the extent the police expect that witnesses exist who will be willing to testify to relevant events, the likelihood is almost always significantly greater that those witnesses can be or will be discovered in the normal course of investigation than that a comparably probative item of tangible evidence can be or will be so discovered.[49]

First, a witness, unlike tangible evidence, has the capacity to make himself be known, and the more the police have reason to expect that a useful witness exists, the more likely it is that such a witness will

[49] Some courts and commentators have criticized the inevitable discovery exception on the ground that "[s]uch a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy." *United States* v. *Paroutian*, 299 F. 2d 486, 489 (C.A. 2). See also Note, *supra*, 74 Colum. L. Rev. at 99. The same argument could be made against the contention we advance here, but the argument rests on a fundamental fallacy. The purposes of the exclusionary rule are remedial and forward-looking; its harsh remedy must be carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Thus, delineation of the scope of the rule must focus on the incentives of the police to commit an act before it occurs, since this rule was not designed simply to punish the police (and society) after the fact for having done an unnecessary act.

come forward. Second, identification of likely witnesses to criminal acts is a normal subject of any investigation, and witnesses, unlike tangible evidence, can usually be sought out and interviewed without the necessity of a search—legal or illegal. This case presents an illustrative example. Hennessey, as well as respondent's other employees, were obvious subjects for questioning by officers investigating respondent's gambling activities, and indeed some of respondent's other employees were interviewed (Pet. App. 30a). The only reason a fruits question arises in this case at all is that a prior investigation of respondent had been discontinued a year earlier and, by happenstance, Biro's search disclosed evidence that respondent was engaging in a crime (and that Hennessey knew something about it) and thus revivified the investigation. But that happenstance does not suggest that Biro's search was in any way motivated by a desire to discover useful witnesses; nor does it affect the general proposition that, given sufficient suspicion to prompt an investigation, police have significantly less incentive to search for witnesses by unlawful means than to search for other evidence by unlawful means.[50]

[50] Indeed, there is even more reason not to exclude derivative evidence in a case where, as here, the police misconduct discloses for the first time that a crime has been or is being committed and thus prompts an investigation. If the fruits of that investigation were to be excluded as tainted by the initial illegality, the crime could almost never be punished because the government could almost never prove that these fruits had an independent source. But as Judge Hand said on the remand of the *Nardone* case, the government is not required to show that illegally obtained information "has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or to make such a fetich [sic] of the statute as so extreme an application of it would demand." 127 F. 2d at 523. Subsequently, however, the Second Circuit, applying a strict causation analysis to fruits questions, appears to have adopted precisely that inquiry. *United States* v. *Falley*, 489 F. 2d 33, 41; *United States* v. *Cole*, 463 F. 2d 163, 172, certiorari denied, 409 U.S. 942; *United States* v. *Schipani*, 414 F. 2d 1262, 1266, certiorari denied, 397 U.S. 922.

In sum, while we do not contend that exclusion of witness testimony would provide no marginal deterrence, the inherent differences between that and other kinds of evidence support the common sense conclusion that the police have significantly less incentive to secure that type of evidence through unlawful searches or other misconduct, and, consequently, that application of the exclusionary rule to such testimony would provide significantly less deterrence benefits than other applications of the exclusionary rule that have been approved by this Court.

2. Exclusion of live-witness testimony is more costly to the administration of justice

On the other side of the balance, the exclusion of the testimony of a witness has a greater impact on society's ability to enforce the law than the exclusion of other kinds of evidence. Tangible evidence and verbal confessions, which speak for themselves, have a finite scope. Exclusion, though critical to the outcome of some cases, thus has a relatively limited impact that may in some sense be deemed proportionate to the official wrong giving rise to the exclusion.

On the other hand, disabling a witness and all that witness may know about the defendant's prior criminal activities, however unrelated to the purpose of the search or the evidence discovered by the search, would usually impose a cost far out of proportion to the infraction that exclusion is designed deter.[51] In this respect, the Court's observations in *United States* v. *Bayer,* 331 U.S. 532, made in another context, are pertinent. The Court held in *Bayer* that the defendant's voluntary confession, made six months after a similar but involuntary confession, was not an excludable fruit of the first, and observed (331 U.S. at 540):

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. * * *

[51] As McCormick states, "The rules which disqualify witnesses who have knowledge of relevant facts and mental capacity to convey that knowledge are serious obstructions to the ascertainment of truth. For a century the course of legal evolution has been in the direction of sweeping away these obstructions." McCormick on *Evidence*, § 71, p. 150 (1954).

By the same token, the Court has never perpetually disabled a witness from providing useful testimony simply because "in a sense" the testimony may be the fruit of some police misconduct. See *Michigan* v. *Tucker, supra.* Cf. *Frisbie* v. *Collins,* 342 U.S. 519; and n. 40, *supra.*

Another consideration that weighs in favor of greater liberality in admitting the testimony of a witness about matters known to the witness independent of any illegal search is the defendant's lesser privacy interest in that kind of evidence. While individuals have a substantial, constitutionally recognized expectation of privacy in their persons, houses, and effects and in the matters that invasions of those private areas may reveal, they ordinarily have no recognized privacy interest in information disclosed by them to or otherwise possessed by third parties. See, *e.g., United States* v. *White,* 401 U.S. 745; *Hoffa* v. *United States,* 385 U.S. 293. Consequently, while the act of introducing illegally seized physical evidence at trial will frequently entail a renewed invasion of privacy,[52] a third party's testimony would rarely trench upon such interests, because it would relate to matters known by the witness wholly independently of any illegal search.

[52] It is on this principle that 18 U.S.C 2510 *et seq.*, which regulates electronic surveillance, prohibits not only unauthorized interception of communications but equally their subsequent disclosure.

C. THE TESTIMONY OF A WITNESS SHOULD BE EXCLUDED ONLY IF THE EVIDENCE ESTABLISHES THAT THE ILLEGAL SEARCH WAS MOTIVATED BY THE SPECIFIC PURPOSE OF DISCOVERING THE NAMES OF POTENTIAL WITNESSES

Our discussion thus far has focused on the typical situation, in which the discovery of the identity of a potential witness is more or less incidental to police misconduct. In some cases, however, the police may engage in some unlawful act for the specific purpose of discovering potentially useful witnesses. Where the evidence supports such a finding, exclusion of the witness's testimony may be appropriate and necessary to deter similarly motivated misconduct in the future.[53]

It would be inappropriate here to try to delineate all the circumstances that would fit within this exception.[54] It is clear, in any event, that such an exception would not apply in this case. The evidence established that Officer Biro's search of the envelope was not for the purpose of discovering witnesses, since he had

[53] Such a case may well be illustrated by *United States* v. *Karathanos*, 531 F. 2d 26 (C.A. 2), certiorari denied, 428 U.S. 910, where, as the affidavit supporting a search warrant reflected, federal agents searched a restaurant for the specific purpose of discovering illegal aliens and subsequently sought to use the aliens' testimony against the restaurant owner. The same is true in the border-area traffic search or stop cases, *e.g.*, *United States* v. *Brignoni-Ponce*, 422 U.S. 873.

[54] While such an exception would no doubt generate questions of proof concerning the intentions of the police, those questions would be no more difficult than attempting to ascertain the state of mind or free will of a witness and would be more related to the purposes of the exclusionary rule.

no prior knowledge of respondent's gambling activities. Indeed, the search can hardly be said to have been for any purpose; it was plainly an unconsidered act of curiosity prompted by his seeing an envelope containing some money. To exclude Hennessey's testimony on the basis of that act would not serve the deterrent purposes of the exclusionary rule.

D. THE TESTIMONY OF LOIS HENNESSEY SHOULD NOT HAVE BEEN SUPPRESSED UNDER THE *WONG SUN* AND *BROWN* ATTENUATION ANALYSIS

We have argued above that the question of live-witness testimony should be decided as a matter of exclusionary rule policy rather than on the basis of the approach suggested in *Wong Sun* and *Brown*—that is, an *ad hoc* determination in each case whether the testimony was sufficiently an act of free will to break the causal chain, whether the police had impermissibly exploited the primary illegality, and whether police conduct could be said to be purposeful or flagrant. If the Court disagrees with our approach, however, we submit that the testimony of Hennessey should not have been suppressed under the standards set forth in *Wong Sun* and *Brown*.

First, Hennessey's decision was clearly the product of her own free will. When she was first interviewed by Agent Emory four months after the search, she expressed a ready willingness to cooperate based on her interest in police science, and she testified that

the incident of the search played no part in that willingness because it was not even on her mind when Emory first spoke to her.

Second, with respect to temporal proximity to the search, Hennessey was not contacted until four months later and did not testify at trial until six months later.

Third, in no sense can the government be said to have exploited the illegal search. When Emory decided to interview Hennessey (as well as other employees in respondent's shop), all he knew was that the local police believed her to be knowledgeable; he did not know how they came by the knowledge or anything about Officer Biro's search.

Finally, Officer Biro's search of the envelope, while hardly commendable, was certainly not a flagrant or purposeful invasion of respondent's Fourth Amendment rights. The envelope was in plain view in an area (behind the counter) which, although technically reserved for employees, was accessible to the public and into which customers of the store might be expected to enter from time to time. Furthermore, the envelope had money protruding from it, and without excusing Officer Biro's curiosity, respondent himself must bear some responsibility for the brief inspection that resulted.

In short, to the extent the criteria set forth in *Wong Sun* and *Brown* v. *Illinois* are determinative, Hennessey's testimony should not have been suppressed as the fruit of Officer Biro's search.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court with instructions to reinstate the court's finding that respondent was guilty of violating 18 U.S.C. 1623.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
RICHARD A. ALLEN,
Assistant to the Solicitor General.
SIDNEY M. GLAZER,
HOWARD WEINTRAUB,
Attorneys.

AUGUST 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1151

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH CECCOLINI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT

GREENSPAN KANAREK JAFFE & FUNK
Attorneys for Respondent
14 Mamaroneck Avenue
White Plains, New York 10601

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	2
FEDERAL CRIMINAL RULE INVOLVED	3
PRELIMINARY STATEMENT	4
STATEMENT OF CASE	4
ARGUMENT:	
Point I—The Government appeal of the instant case is precluded by the double jeopardy clause	11
Point II—The exclusion of the fruits of the concededly illegal search was proper	17
Point III—The trial court below properly suppressed the testimony of Lois Hennessey	26
Point IV—The Government totally failed to establish that Lois Hennessey's testimony would have discovered absent the illegal search	31
Point V—The inequitable conduct of the Government estops it from appeal or from asserting a claim of attenuation of taint	35
CONCLUSION	40

PAGE

Cases Cited

Bell & Howell Co. v. Bliss, 262 F. 131 (7th Cir., 1919) 35

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969) 37

Brady v. State of Maryland, 313 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) 37

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) 23

Elkins v. U.S., 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) 27

General Electric Company v. Hygrade Sylvania Corp., 45 F.Supp. 714 (S.D.N.Y., 1942) 35

Gilbert v. California, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967) 37

Gissendanner v. Wainright, 482 F. 2d 1293 (5th Cir., 1973) 28

Green v. U.S., 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) 15

Griffin v. California, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 2d 891 (1956) 37

Gynex Corp. v. Dilex Institute of Hygiene, 85 F.2d 103 (2nd Cir., 1936) 35

Harris v. New York, 401 U.S. 722, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971) 37

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) reh. den. 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed.2d 72 ..... 25, 36

McCann v. Charm Power Company, 211 N.Y. 301 (1914) 36

PAGE

McMullen v. Hoffman, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 35

McNabb v. U.S., 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1942) 24

Memphis Keeley Institute v. Leslie E. Keeley Co., 155 F. 964 (6th Cir., 1907) 35

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 36

Nardone v. U.S., 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939) 28

National Distillers & Chemical Corp. v. Sayopp Corp., 17 N.Y. 2d 12 (1966) 36

Olmstead v. U.S., 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) 26

People v. Martin, 382 Ill. 192 (1942) 25

Peterson v. U.S., 411 F. 2d 1074 (8th Cir., 1969) 31

Rea v. U.S., 350 U.S. 214, 100 L.Ed. 233 (1956) 27

Seagirt Realty Corp. v. Chaznoff, 13 N.Y. 2d 282 (1964) 36

Serfass v. U.S., 420 U.S. 377, 95 S.Ct 1055, 43 L.Ed. 2d 265 (1975) 13

S. Etheridge v. U.S., 380 F. 2d 804 (5th Cir., 1967) 28

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1907, 18 L.Ed. 2d 1199 37

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 23

U.S. v. Basurto, 497 F. 2d 781 (9th Cir., 1964) 28

U.S. v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) 29

PAGE

U.S. v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974) 24, 25

U.S. v. Cole, 463 F.2d 163 (2nd Cir., 1972) 33

U.S. v. Dinitz, —— U.S. ——, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) 39

U.S. v. Edmons, 432 F. 2d 577 (2d Cir., 1970) 26

U.S. v. Edwards, 441 F. 2d 749 (5th Cir., 1971) 24

U.S. v. Evans, 454 F.2d 813 (8th Cir., 1972) 34

U.S. v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed. 2d 627 (1966) 37

U.S. v. Falley, 489 F.2d 33 (2nd Cir., 1973) 32-34

U.S. v. Fay, 553 F. 2d 1247 (10 Cir. 1977) 13

U.S. v. Fayer, 523 F. 2d 661 (2d Cir., 1975) 15

U.S. v. Guana-Sanchez, 484 F. 2d 590 (7th Cir., 1973) 29

U.S. v. Isaacs, 347 F. Supp. 743 (N.D.E.D. Ill. 1972) 24

U.S. v. Jacobs, 547 F. 2d 772 (2d Cir., 1976) 6

U.S. v. Jaramillo, 510 F. 2d, 808 (8th Cir., 1975) cert. den. 423 U.S. 1048 15

U.S. v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed. 250 (1975) 14, 15

U.S. v. Karanthanos, 531 F. 2d 26 (2nd Cir., 1976), Cert. Den. 428 U.S. 910 29

U.S. v. Kopp, 50 L.Ed.2d 336, 97 S.Ct. 400 (1976) 14

U.S. v. Lucido, 517 F. 2d 1 (6th Cir., 1975) 14

U.S. v. Macry, 185 F.Supp. 144 (D. Conn. 1960) 31

PAGE

U.S. v. Mangujano, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976) 21

U.S. v. Marder, 474 F. 2d 1192 (1973) 28

U.S. v. Martin Linen Suply Co., 97 S. Ct. 1349 (1977) 2, 12, 13

U.S. v. Monroe, 205 F. Supp. 175 (E. D. Louisiana, 1962) 25

U.S. v. Morrison, 50 L. Ed. 2d 1 (1976) 14

U.S. v. Paepke, 550 F.2d 385 (7th Cir., 1977) 21

U.S. v. Paroutian, 299 F.2d 486 (2nd Cir., 1962) 33, 34

U.S. v. Raftery, 534 F.2d 854 (9th Cir., 1976) 21, 22

U.S. v. Robbins, 510 F. 2d 301 (6th Cir., 1975) 15

U.S. v. Rose, 50 L. Ed. 2d 5 (1976) 14

U.S. v. Schipani, 414 F.2d 1262 (2nd Cir., 1969) 33, 34

U.S. v. Sorenson, 504 F. 2d 406 (7th Cir., 1974) 15

U.S. v. Tane, 329 F. 2d 848 (2d Cir., 1964) 29, 33, 34

U.S. v. Turk, 526 F.2d 654 (5th Cir., 1976) 21, 22

U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1178 (1967) 37

U.S. v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed. 2d 232 (1975) 15

U.S. v. Winsett, 518 F. Supp. 51 (9th Cir., 1975) 24

Walder v. U.S., 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 2d 503 (1954) 28, 38

Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) 24

PAGE

Williams v. United States, 382 F. 2d 48 (5th Cir., 1967) 29

Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 27, 28

United States Constitution Cited

Fourth Amendment 2, 23-26, 28

Fifth Amendment 2

Statute Cited

18 U.S.C.:

Sec. 3731 ..... 2, 4, 13, 38

Rules Cited

Federal Rules of Criminal Procedure:

R. 12 39

R. 12(D)(1) 12

R. 12(e) 11, 16, 39

R. 29 ..... 2, 3, 10

Other Authorities Cited

30 CJS Equity:

Sec. 97, pp. 1031-1032 35

PAGE

Maguire, "How to Unpoison the Fruit, The Fourth Amendment and the Exclusionary Rule," 55 J. Krim. L.C.&P. S. (1964):

307, 317 32

20 NY Jur., Equity:

Sec. 112, p. 132 35

Ruffin, Out on a Limb of a Poisonous Tree: The Tainted Witness, § 15 UCLA L.Rev. (1967):

32-33 30

S.Rep. No. 91-1296, Page 2 (1970) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1151

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH CECCOLINI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT

Pursuant to an Order of this Court, the time for filing the within Brief has been extended to October 25, 1977.

Questions Presented

In the opinion of respondent, the following questions are presented:

(1) Does the double jeopardy issue clause, and the decision of this Court in *U.S.* v. *Martin Linen Supply Co.*, 97 S.Ct. 1349 (1977), bar the government's attempted appeal from the judgment of acquittal entered in the District Court pursuant to Rule 29?

(2) Whether the holding of the Courts beiow, that the government failed to meet its burden of establishing attenuation of the taint of a concededly illegal search was free from error and supported by substantial evidence?

(3) Whether the Government is estopped from maintaining an appeal by virtue of its unclean hands?

Constitutional Provisions Involved

The United States Constitution Amendment 5:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The United States Constitution Amendment 4:

> "The right of the People to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statutory Provisions Involved

18 U.S.C. §3731:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing the indictment or information as to any one or more counts, except that no appeal shall lie where the

> double jeopardy clause of the United States Constitution prohibits further prosecution."

Federal Criminal Rule Involved

Federal Rule of Criminal Procedure 29:

> "Motion for Judgment of Acquittal (a) motion before submission to jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed. If the evidence is sufficient to sustain a conviction of such offense or offenses. If a defendant's motion for a judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right. (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all evidence, the Court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. (c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within seven (7) days after the jury is discharged or within such further time as the court may fix during the seven (7) day period. If a verdict of guilty is returned the court may, on motion, set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal.

It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

Preliminary Statement

The government, pursuant to 18 U.S.C. §3731, appealed to the Second Circuit Court of Appeals from a judgment of acquittal entered in the Southern District of New York (A2) on February 10, 1976, by the Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York. On that date, Judge Gagliardi announced that he acquitted the defendant of Count 2 and found him guilty of Count 1 but immediately set aside his verdict on Count 1 and granted defendant's motion for judgment of acquittal on the grounds that the evidence relied on by the Government was the unattenuated fruits of an illegal search.

It is the position of the defendant that under the circumstances presented by this record, a Government appeal violates the double jeopardy clause. It is further contended that the courts below correctly held that the Government had failed to attenuate the taint of a concededly illegal search. Finally, it is submitted that the Government is estopped from maintaining this appeal because it does not come into court with clean hands.

Statement of Case

In 1973, the Federal Government conducted a gambling investigation in the North Tarrytown area (A59-63). The surveillance conducted by the FBI agents had included various businesses on Beekman Avenue which were frequently visited by one Joseph Millow, including defendant-respondent's flower shop. At no time during this period were any of the employees of any business enterprise located on Beekman Avenue questioned with regard to

gambling activities. The surveillance was ultimately discontinued, in December, 1973 (A63).

On December 18, 1974 North Tarrytown Patrolman Ronald Biro, entered defendant-respondent's flower shop in uniform and on duty. He was observed entering the shop by a young lady named Lois Hennessey. Ms. Hennessey was reading her newspaper when Patrolman Biro entered the flower shop. Biro proceeded through the area opened to the public into a portion of the flower shop customarily used only by the employees. He observed an envelope on the cash register from which allegedly protruded what appeared to be United States currency. Patrolman Biro proceeded, without further ado or probable cause, to seize and search the envelope. After he had removed and examined the contents of the envelope he then interrogated Ms. Hennessey concerning them (A34-37, 51-53, 54-57). In this way he then and there discovered the existence of Ms. Hennessey as a person having knowledge that could be utilized by the Government (A58-59). He thereafter replaced the envelope and its contents on the cash register, and left[1]. The defendant, was not present at any time during this occurrence and was in no way aware that there had been a search (A46).

Patrolman Biro notified the North Tarrytown Detective Division without twenty-four hours of the previously mentioned occurrence (A56-57). The Detective Division thereafter notified FBI Agent Emory with whom they were then working jointly on a gambling investigation. Emory then proceeded to notify prosecutor Abzug (A73) and then interviewed Ms. Hennessey specifically about the incident

---

[1] It subsequently disappeared and there was thus no physical evidence in the possession of the Government to be suppressed. Only the testimony of Patrolman Biro (upon which Judge Gagliardi never ruled explicitly) and that of Ms. Hennessey remained as the fruits of the illegal search.

of December, 1974 (A67-68, 42-43; cf. 68-69). The Emory-Hennessey interview occurred in or about April of 1975 (A73). The defendant was subsequently subpoenaed before the Grand Jury in May of 1975. At the time of defendant's appearance before the Grand Jury he appeared without counsel and was somewhat disingenuously advised that he was not the target of investigation (A73). It is interesting to note from a point of comparison that the other witnesses in the same investigation were specifically advised of their right to counsel, of the privilege against self-incrimination, and were not given any disarming advice that they were not targets of the investigation, even when in fact they were not such targets. The 3500 material turned over by the Government showed, for example, that Ms. Albanese, who appeared with counsel, was specifically warned of her privilege against self-incrimination and her right to counsel but received no statement that she was not a target of the investigation. Compare this with *U.S.* v. *Jacobs*, 547 F. 2d 772 (2d Cir., 1976). The defendant was, however, indicted immediately thereafter when his answers were at variance with those of Ms. Hennessey.

In the over six months between the illegal search and defendant's Grand Jury testimony, not a single other employee of defendant's flower shop or any other business located on Beekman Avenue had been interviewed or approached by the FBI. It should be further noted that subsequent to defendant's indictment, other employees of the flower shop were, in fact, subpoenaed and their testimony was consistent with that of the defendant and inconsistent with that of Lois Hennessey.[2]

---

[2] Jane Vitagliano began working at the flower shop on February 3, 1975 (A77), which was long after the December period inquired upon by the Grand Jury. She testified over two months after Cecco-

(Footnote continued on following page)

As part of defendant's preparation for trial various motions were made and presented to the Court. The Court held a conference and made its rulings in July of 1975. It took the Government in excess of two months to finally comply with the directives of the Court regarding defendant's motion practice. The Government's compliance finally occurred on the eve of trial. The list of witnesses presented to counsel contained the name of Patrolman Biro who was immediately interviewed by the defense. It was at this point in time that the defendant learned for the first time of the existence of a search (TR17-18).

The Government had contributed in no small measure to the defendant's surprise. Completely aside from failing to advise the defendant of a search of his premises when he was not present, and in the absence of a warrant for any conceivable probable cause, the Government took it upon itself to include in its discovery exhibits a certain envelope marked "12/31/74" which appeared to be, but was in fact not, the December envelope referred to in the

---

(Footnote continued from preceding page)

lini's testimony and after his indictment as did each other flower shop witness. Her testimony was that Millow came in just to say "hello" (A77-78). She had never seen any gambling of any kind at the shop (A78). Cathleen Kosilla, a part-time employee (A78-81) was summoned to the Grand *Jury* after Ceccolini had been indicted (TR428). She had seen no gambling at the store (A81-82). Roseanna Pesce, who did work in the store in September and October of 1974 (A82-83) when Lois Hennessey did not work there (A82-83), was the wife of a New York City Police Sergeant (A82), had never been interviewed by the FBI and saw absolutely no gambling (A83). Lois Hennessey was there only for a matter of minutes after 5:00 during these months (A82-83). Defendant's girlfriend, Rosemary Albanese, brought to the Grand Jury in October *after* defendant's indictment (A48-49) saw absolutely no evidence of gambling at the flower shop (A50-51).

Grand Jury testimony. Aside from its misleading appearance, it had absolutely no other significance on the outcome of the case.

Upon discovery of the existence of a search, which defendant did not become aware of until the eve of trial, an immediate motion was made orally by defendant's attorneys before Judge Gagliardi, who observed that the defendant could not have moved sooner because he had no knowledge of the search (TR17-18). Judge Gagliardi directed that the hearing on the motion proceed simultaneously with the trial. The defendant waived his right to trial by jury and the trial commenced.

During the course of the trial, all the testimony that related to the search and its fruits came from Government witnesses during the direct case. The testimony with respect to this search and its fruits was given by Patrolman Biro and FBI Agent Emory, Detectives Spota and DeFalco and Ms. Hennessey. As the transcript of the opinion of the Court below demonstrates, Judge Gagliardi determined during the trial that the search was illegal and suppressed the result of the search. The relative portion of this commentary was contained in petitioner's Appendix D, Page 34a of the Appendix before this Court on petitioner's application for writ of certiorari. On Page 36a of that same document the Court however stated:

> "I don't think it makes any difference as to when I passed upon the exclusion of the fruits of the search because it was clearly inadmissable."

His Honor also stated that without the fruit of the illegal search:

> "There was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty of Count 1 charged in the indictment." (Petitioner's *Petition* Appendix 32a).

The Court added that the remaining evidence:

> "standing by itself it is insufficient to prove Ceccolini guilty beyond a reasonable doubt." *Id.*

Notwithstanding that the motion to suppress was made immediately prior to the trial, and then only because the Government had withheld the existence of the search from the Court and the defendant, the Court, which heard both the motion and trial jointly, purported to decide the merits first and the ruling on the motion to suppress only thereafter in connection with the motion for judgment of acquittal. *The combined procedure of the Government and the Court resulted in depriving the defendant of a pre-trial or during the trial suppression ruling* (beyond the judge's post-verdict statement that he excluded the result of the search and that it made no difference when he passed upon the exclusion of the fruits of the search which were clearly not admissible). In the normal course of events (had the judge suppressed prior to or during trial or prior to announcing his verdict), since the remaining evidence was clearly insufficient and so found by the Court, the defendant would have been entitled as a matter of right to an acquittal. *Instead, the Court endeavored, by the order of its rulings, to create a right of appeal in the Government.* It is respectfully submitted that the procedure utilized was, in fact, a judgment of acquittal or the functional equivalent thereof and that any attempted appeal therefrom violates the double jeopardy clause, or in any event should not be permitted because of the inequitable conduct of the government.

The illegal search itself was described by both parties present (A25, 35-36, 51-52, 55-56). It was further added by Patrolman Biro that he had no prior knowledge of Ms. Hennessey as a possible witness and that he further specifically learned this during the illegal search conducted by him on December 18, 1974 (A58-59). He further testified that he notified the North Tarrytown detectives within

twenty-four hours. The testimony of the detectives indicated that they notified FBI Agent Emory. Agent Emory corroborated these statements by testifying that the North Tarrytown Police had notified him. Ms. Hennessey stated that Agent Emory told her he received his information regarding her and the December incident from the North Tarrytown Police and that he specifically asked her about the December incident (41-42). *She described it to him because she knew he already had or could get that information from the North Tarrytown Police* (A42-43). On the other hand, Ms. Hennessey testified that although it was football season and football tickets were hidden in wax paper at the store, she did not show these to Patrolman Biro (A43-44).

It was clear from all the testimony summarized above that the search was:

(a) Without probable cause,

(b) Without a warrant,

(c) Without consent,

(d) Not incidental to a lawful arrest, and

(e) Conducted by a law enforcement officer on duty and in uniform, without justification and unlawfully.

It was equally clear to the Court that Ms. Hennessey and her knowledge were the instant and immediate fruits of that search and the interrogation which took place was a part of that search (A36, 58, 39, 41-43). The district court specifically found the search illegal and suppressed both the results of the search (Petitioner's Petition Appendix 35A) and the fruits of the search (Petitioner's Petition Appendix 36A). It then set aside the verdict on the first count as the remaining evidence which was clearly insufficient to convict, exonerated bail and pursuant to the power vested in the Court by F.R.Cr.P. 29 entered judgment of acquittal in favor of defendant.

ARGUMENT

POINT I

The Government appeal of the instant case is precluded by the double jeopardy clause.

When the instant case appeared before the District Court below, Judge Gagliardi directed that defendant's motion to suppress and the trial be determined together as permitted by Federal Rule 12E where good cause is shown. During the course of trial, Judge Gagliardi made a specific finding that the search which transpired on December 18, 1974 was illegal and thereafter excluded what were the results of the search holding that the fruits of the search were clearly not admissible by reason of the exclusionary rule. It was the further finding of the Court below that the Government's attention had not focused on Lois Hennessey prior to the illegal search (Petitioner's Petition Appendix 28A-29A) and that the Government had not sustained its burden of showing that Ms. Hennessey's testimony would have been obtained definitely without the illegal search (Petitioner's Petition Appendix 29A). The Court below concluded that without Hennessey's testimony there was insufficient evidence to find defendant guilty on Count 1 and that the corroborating evidence standing by itself was insufficient to prove defendant's guilt beyond a reasonable doubt (Petitioner's Petition Appendix 32A).

Although a Court determination of acquittal was both merited and warranted by the finding below, Judge Gagliardi failed to follow this procedure. In a somewhat unique procedure, the Court purported to consider all the evidence before it including that evidence which it suppressed despite the fact that such evidence was inadmissible at trial. A determination was thereafter made by the Court which was based upon consideration given to *all* of the evidence, both legal and illegal. This determina-

tion stated that defendant Ceccolini was guilty on Count 1 of the indictment. However, Judge Gagliardi took this determination one step further and proceeded to immediately set aside his own verdict on the grounds that it could not stand without the illegal suppressed evidence and thereafter exonerated bail.

The events which transpired in the proceedings below can be best brought into focus by the recent decision of this Court in *United States* v. *Martin Linen Supply Co.*, 97 S. Ct. 1349 (1977). The defendant in the proceedings below was totally unaware that a search of his premises had occurred in his absence. This unawareness was due primarily to the Government's decision not to utilize the provisions of Federal Criminal Rule 12(D)(1) which provides notice to a defendant that the Government intends to introduce evidence obtained by search and seizure. Further difficulty arose when the Government egregiously delayed complying with Judge Gagliardi's pre-trial Order for several months so that defendant's counsel could not have learned of Patrolman Biro or that there had been a search until the eve of trial. This situation was expressly recognized by the Court below when it stated that the defendant was unable to move for suppression any earlier than he did as a result of the conduct of the Government (TR17-18). The Government's original position with respect to this fact was clearly set out in their Trial Memorandum of Law at Page 11 where they stated:

> "Until the trial, the Government was not concerned about the 'taint problem' because it believed Biro's search to be lawful."

Interestingly enough at trial, the Government utterly abandoned any argument that the search was consented to, or lawful, when the testimony of its own witnesses clearly established otherwise.

It should be apparent to this Court that the acquittal involved in the instant case was:

> "a legal determination on the basis of facts adduced at trial relating to the general issue of the case." (See *Serfass* v. *U.S.*, 420 U.S. 377, 393, 95 S.Ct. 1055, 40 L. Ed. 2d 265 (1975))

The decision of Judge Gagliardi was not an order dismissing an indictment, but rather an acquittal based upon the insufficiency of admissible evidence before the Court (See Opinion of Mr. Justice Stevens, concurring *U.S.* v. *Martin Linen Supply Co.*, supra at 1357). It should be noted that the acquittal was based upon the Judge's determination that the residuum of legal evidence introduced at trial

> "was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty . . ."

and

> "standing by itself, it is insufficient to prove Ceccolini's guilt beyond a reasonable doubt." (Petitioner's Petition Appendix 32A)

The Tenth Circuit in reviewing a situation closely akin to Judge Gagliardi's procedural determination below found that jeopardy had attached and that 18 U.S.C. §3731 did not allow the Government the right to appeal. See *U.S.* v. *Fay*, 553 F. 2d 1247 (2nd Cir. 1977).

A review of the legislative history of 18 U.S.C. §3731 clearly demonstrates the fact that it was not the intention of Congress to authorize the right of the Government to take an appeal from an acquittal. The legislative report begins by stating that the purpose of the bill is

> "to resolve serious problems which frequently have arisen with respect to the right of the United States to appeal the rulings which terminate prosecutions other than by judgment of acquittal . . ." [S.Rep. No. 91-1296, Page 2 (1970)]

The report further defines what a true acquittal is in the eyes of Congress at Page 11. It is there stated

> "A true acquittal is based upon the insufficiency of the evidence to prove an element of the offense."

The *Gagliardi* decision with respect to Count 1 truly fits the definition of acquittal as referred to in the Congressional report. To take an appeal from this decision would be in direct contradiction to the legislative intent and is simply and unequivocally not allowed by the statute. The case which is presently before this Court is not simply a case where the post-verdict ruling is to dismiss an indictment after a guilty verdict where no new trial would necessarily result if the Government prevailed. See e.g., *U.S.* v. *Wilson,* 420 U.S. 332 (1975); *U.S.* v. *Morrison,* 50 L. Ed. 2d 1 (1976); *U.S.* v. *Rose,* 50 L. Ed. 2d 5 (1976); *U.S.* v. *Copp,* 50 L. Ed. 2d 336 (1976). In *Morrison* and in *Rose* there was neither an acquittal nor an order of dismissal. There was merely an order of suppression, which provided that appropriate action would be taken if the order was affirmed on appeal or not appealed from by the Government. In *Copp* the Court entered a dismissal (not an acquittal) based upon an error of law relating to the matter determined at a pre-trial motion and not during the trial of the general issue. In *Wilson* the District Court dismissed the indictment, again reversing a ruling on a motion made prior to the trial and not upon the matter in issue and litigated during the trial of the general issue as was the case here. Compare *U.S.* v. *Lucido,* 517 F. 2d 1 (6th Cir., 1975) in which case the Sixth Circuit ruling on an analogous fact pattern to the case before this Court held that the double jeopardy clause precluded review.

In recent years, some leading cases have emerged from the Supreme Court with respect to this area. The two perhaps leading cases are those of *U.S.* v. *Jenkins,* 420

U.S. 358 (1975) and *U.S.* v. *Wilson,* 420 U.S. 332 (1975). It is defendant's position that although the factual pattern of the instant case may superficially appear similar to that in *Wilson* due to the unique fact pattern of this case it falls more appropriately within the *Jenkins* rule as opposed to the rule set out in *Wilson.* Were this Court to entertain jurisdiction in this case, in the event of a reversal, before the verdict of guilty could be reinstated, new, different and additional findings of fact would be required with regard to the illegality of the search, the attenuation of the taint, and admissibility of the tainted testimony. The case would then come within the rule of *U.S.* v. *Fayer,* 523 F. 2d 661 (2d Cir., 1975). See also *U.S.* v. *Jaramillo,* 510 F. 2d, 808 (8th Cir., 1975); *U.S.* v. *Robbins,* 510 F. 2d 301, (6th Cir., 1975); *U.S.* v. *Sorenson,* 504 F. 2d, 406 (7th Cir., 1974). The Government, in the instant case, is not seeking an appeal solely on a question of law, but rather from the resolution of fact issues at trial which resulted in the defendant's discharge. However denominated, the defendant was in reality acquitted by the trial court's resolution of disputed fact issues in his favor. The double jeopardy clause makes the ruling final. To subject the defendant to any further proceedings at this time would violate the double jeopardy clause:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal of compelling him to live a continuing state of anxiety and insecurity . . ." (*Green* v. *U.S.,* 355 U.S. 184, 187, 78 S.Ct. 221, 2 L. Ed. 2d 199 [1957])

As a result of the Government's failure to disclose the existence of the search and the District Court's insistence

that contrary to the preferable method of proceeding in the Second Circuit there will be a joint hearing of the motion of suppression and the merits, no pre-trial hearing took place on the issue of suppression. Moreover, there was no good cause shown for deferring the ruling on the motion to suppress until after the verdict (which is required by Rule 12[e]) as distinguished from cause for hearing the general issue and the motion together. The basic understanding of the defense counsel on the court directed a joint hearing on the motion and trial was that the ruling on the suppression motion would precede the verdict on each count, and the findings on each count would be based on that evidence which survived the motion to suppress (Petitioner's Petition Appendix 33A). At no point below was defense counsel's original understanding ever disputed by the Court or the Government. It should be quite apparent that this understanding played a significant factor in defense counsel's reaction to the Court's decision to hold a joint hearing and defendant's decision to waive trial by jury. It cannot be disputed that the Government's action deprived the defendant of an opportunity to raise the question of suppression at any point prior to trial. Indeed, the findings of fact which the District Court made to support its judgment of acquittal were precisely those which result from a trial of the general issue that "There was sufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty" and that the admissible evidence "Is sufficient to prove Ceccolini's guilt beyond a reasonable doubt". (Petitioner's Petition Appendix 32A). Upon the unique set of facts demonstrated by this case, the District Court's ruling however denominated, was a judgment of acquittal based upon factual issues elicited at the trial of the general issue and the Government's attempted appeal therefrom is clearly offensive to the provisions of the double jeopardy clause.

POINT II

The exclusion of the fruits of the concededly illegal search was proper.

The various factors involved with the aspect of the fruits of the illegal search have been painstakingly examined in meticulous detail by both the District Court below and the Circuit Court of Appeals. The Trial Court's findings that the December search was illegal, that witness Hennessey was discovered directly as a result of and in the course of that search and that the information was immediately conveyed to the local police and later to the FBI can hardly be disputed. The search was conducted by a police officer, in uniform, who was no stranger to the gambling investigation which related to the flower shop in that he had previously participated in the investigation. Without so much as one request for permission the police officer deliberately placed himself, without consent, in an area of the flower shop that was designated for employees only, and in which area he had no right to be in without permission of either an employee or the management of the flower shop. In a deliberate action the police officer seized and opened an envelope lying on the cash register which could in no way be construed as suspicious by reason of the fact that money appeared to be in the envelope, or protruding therefrom, since the cash register is not at all an unusual place to place money, either in or on.

After having seized and searched the envelope and its contents without warrant, probable cause, or consent, the Patrolman then immediately interrogated Lois Hennessey, who was working in the store at that very moment. At no time during this entire occurrence was defendant Ceccolini ever present. We can see by the actions of the police officer that immediately after the search, he exploited the illegality without the lapse of even a moment. The testi-

mony below indicates after the police officer had gotten what he wanted from Miss Hennessey, he replaced the contents into the envelope, placed it back on the cash register. Within 24 hours after his interview with Hennessey, the information which was obtained by the Patrolman as a result of his illegal search was conveyed to the Detective of his Department. The Detective Division notified FBI Agent Emory, and Agent Emory in turn relayed the information to the prosecutor.

The Government would have us believe that FBI Agent Emory was unaware of the illegality which tainted the origin of the information which he received. It is somewhat disingenious to suggest that the Government had no knowledge of the illegality of the search, since the "Silver Platter" doctrine renders knowledge of the local police who reported the information to the FBI, chargeable to the FBI. It is somewhat incredulous to say that the Government had no knowledge of the illegality since Lois Hennessey's description of the Search (A25, 26) made clear the illegal manner in which it occurred. Patrolman Biro was equally candid about this fact (A51-52, 55-56) the Government attempts to argue that the Hennessey testimony was somehow free of the taint of the manner in which she was discovered. However, it is clear that she was discovered solely and directly as the result of the search (A58-59). It is also clear that that fact, and that fact alone, relayed from the police to the FBI and the prosecutor, led the FBI to their interview with Miss Hennessey (A58-59, 67-68, 75-76). It should be apparent that she answered Patrolman Biro originally after he confronted and interrogated her with the illegally received evidence in his hands at a time and place where he was in uniform, and she felt constrained by the circumstances to answer his questions, but not to volunteer information (A43-44). Miss Hennessey further testified that she answered Agent Emory's questions because *she knew that he had or could get the information which he inquired about*

from the North Tarrytown Police (A42-43). This can hardly be construed as an act of free will divorced from the illegal search. Rather, it is so closely aligned with the search that it might properly be called the result, or more commonly the fruits of the illegal search.

The Court of Appeals specifically characterized this path as "both straight and uninterrupted". Judge Gagliardi, in the District Court below, specifically found that Lois Hennessey's knowledge first came to the attention of the Government as a result of the illegal search (Petitioner's Petition Appendix 28A, 29A). The FBI agent testified that Hennessey came to his attention because of the illegal search (Petitioner's Petition Appendix 30A). It was the further finding of the Court below that prior to the search the Government's attention had never focused on Miss Hennessey. Moreover, at the time she was interviewed, Hennessey no longer was an employee of the store, and therefore had no current information to provide. It is apparent that the findings of the District Court, affirmed on appeal, that the Government had failed to attenuate the taint of the illegal search, was not clearly erroneous. Indeed, the Government conceded as much on oral argument in the Second Circuit.

What the Government seeks to do here is to totally destroy the last vestige of the exclusionary rule by allowing illegally obtained evidence to come in as part of the prosecutor's direct case. Indeed, it comes in as the prosecution's entire case, because without it the evidence against this defendant is concededly insufficient. It should further be noted that it is false and misleading to suggest that an ongoing Federal gambling investigation involving contacts with various flower shop employees, was occurring at any time prior to defendant's Grand Jury testimony. As the testimony of Agent Emory indicated, his surveillance in the area had terminated at least one year before the occurrence of the illegal search. In six months the FBI had made no con-

tact with any employees of any enterprise for fear of tipping off those under observation (A73-74). In December of 1974, and in February of 1975, no employees of any enterprise had been contacted. In February of 1975, Miss Hennessey terminated her employment at the flower shop (TR60) and was not in an employee status when contacted by the FBI (A37-38). No other employees or ex-employees were ever contacted by the FBI until *after* the defendant had been indicted. Even then, no other employee of any other business enterprise in the area was ever contacted. The FBI policy at this time was to avoid contacting people such as Miss Hennessey for fear of compromising their investigation. It should be apparent that when Agent Emory attempted to suggest that at some date in the future he might ultimately have made contact with an employee, he was clearly talking about an employee still within the store to inform the FBI of current developments, rather than an employee who was no longer employed in the store, and was totally unaware of the recent developments which had taken place (A73-74).

Miss Hennessey clearly did not fit the pattern employed by the FBI in their investigation. In fact, none of the people who fit this pattern were contacted by the authorities until after the defendant had been indicted. Even after they were contacted, they supplied the Government with absolutely no helpful information. In fact, the evidence they supplied contradicted that which was given by Miss Hennessey. From this factual pattern Judge Gagliardi found that the conclusion that Miss Hennessey's testimony was a direct result of the illegal search was compelled by the record.

The Government's position that the exclusionary rule should not be applied to suppress evidence in prosecutions for crimes committed after an illegal search is incorrect, despite the fact that its draftsmanship was both artful and skillful. The defendant in the instant case never knew

of the illegal search until the eve of trial. It is inconceivable to infer that he would have had the intent to exploit its occurrence when he was not aware of it. He had no independent intent to commit any crime. The defendant appeared before a Federal Grand Jury by reason of a subpoena which was issued from a Federal prosecutor who knew full well of the prior search. *If anyone is guilty of exploitation it should be clear that it was the prosecutor who exploited the illegal search, not only in the secrecy of the Grand Jury, but under the most egregious circumstances.* The prosecutor substantially disarmed defendant by advising him that he was not a target of the investigation, and this was the only advice which the defendant received from the prosecutor. By contrast, other witnesses in this same investigation were warned specifically of their right to counsel, and of the privilege against self-incrimination, and were not given any disarming advice that they were not targets of the investigation, even when, in fact, they were such targets. This sequence of events, which resulted in the defendant's immediate indictment does not eliminate the suggestion of sophisticated, calculated abuse of the Grand Jury. *See U.S.* v. *Mangujano,* 425 US 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976), Brennan, J. and Stewart J. concurring.

It is particularly noteworthy that in two cases cited for the prosecution, that such evidence should be admitted, in the Fifth and Ninth Circuit Courts of Appeal took pains to point out that the situation might be very different if the defendant did not know prior to the Grand Jury of the illegal search. *U.S.* v. *Turk,* 526 F.2d 654, 667, n.39 (5th Cir. 1976); *U.S.* v. *Raftery,* 534 F.2d 854, 857, n.7 (9th Cir. 1976). As the Fifth Circuit observed, there would be a deterrent value in prohibiting the surprise use of illegally seized evidence to obtain a perjury conviction. This distinction is also alluded to in *U.S.* v. *Paepke,* 550 F.2d 385 (7th Cir. 1977). *The Government's conduct rose*

to the level of entrapment offensive to the fundamental concepts of fair play embodied in due process clause. The defendant had no pre-disposition to go to the Grand Jury. He appeared before the Grand Jury under compulsion of Federal subpoena and uncounselled. It was not his choice as to the subject matter of his interrogation or its time or place. He was given no warning of his right to counsel, although that warning is normally given by United States Attorneys in the Second Circuit. Nor was the defendant given any warning regarding his privilege against self-incrimination, although that warning is usually given by United States Attorneys in the Second Circuit. Still unaware of the illegal search, he was advised and, indeed, substantially disarmed by the prosecutor, who told him that he was not a target of the investigation. This was the only advice he received from the prosecutor. This was the basis upon which the prosecutor chose not to fairly apprise him of his situation, but rather, to steer the defendant toward the shoals of a perjury indictment as he sat blindfolded, disarmed, uncounselled and unwarned in the Grand Jury.

The fact pattern before this Court is a far cry from those underlying the *Turk* and *Raftery* decisions. In each of those cases the defendants sought to take advantage of his knowledge that the search was illegal. A fair balance struck between the competing interests cannot allow the Government to play its cards as close to the vest as it did here and then allow the Government to turn around and request of this Court the right to violate the defendant's rights just one more time. This is doubly so with the evidence as introduced as part of the Government's direct case, and is the only evidence upon which a conviction may be based. The procedure employed by the Government in this case dates back to the inquisitorial days of Spain. No case has gone so far as to sanction such a result and it is insisted that none should.

> "Courts which sit under the Constitution cannot and will not be a party to lawless invasion of the constitutional rights of citizens by permitting unhindered Governmental use of the fruits of such invasions." [*Terry* v. *Ohio,* 392 U.S. 1, 12-13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)].

The deterrent value of the exclusionary rule is most likely to be effective at cases where official conduct is flagrantly abusive of the Fourth Amendment rights. The corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied in this case. See *Brown* v. *Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

There is no evidence present in the instant case which could insinuate that Patrolman Biro had any reason to believe that his search was legal. His testimony clearly excludes that possibility. To allow into the Government's direct case the results of so flagrant and deliberate an intrusion is to discard the Fourth Amendment totally. By reason of the fact that Biro returned the physical evidence to its original location after interrogating Ms. Hennessey and its subsequent disappearance, there was no physical evidence to suppress. Unless the testimony of Biro and Hennessey were suppressed, the Government would suffer naught for the flagrant violation of the defendant's rights.

The Government's next attempt to escape the logic that Ms. Hennesey's testimony was excluded by reason of the exclusionary rule. The Government argues that the purpose of the exclusionary rule is not served by forbidding the use of the legally obtained evidence to prove the entirely separate offense of the defendant's perjury before the Grand Jury. It is the Government's position that the purpose of the exclusionary rule is satisfied since the Government is precluded from using this testimony in a

prosecution of the defendant for gambling offenses, and thus the deterrent intent of the rule is preserved. Such an argument, however, conveniently avoids the more fundamental guarantees of the Fourth Amendment which are secured and protected by the exclusionary rule and specifically set out in the Fourth Amendment:

> "The purpose of the exclusionary rule is not only to discourage overreaching by the police, but also, and primarily to protect the rights and privacy of the citizen." (U.S.C.A. Const. Amend. 4)

The rationale set forth in the Fourth Amendment has been followed by this Court on several instances. In the case of *McNabb* v. *U.S.*, 318 U.S. 332, 339 (1942) the Court stated

> "A conviction in Federal courts, the foundation of which is evidence obtained in this regard and violation of liberties deemed fundamental by the Constitution cannot stand."

Also see *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 586 L.Ed. 652 (1914); *U.S.* v. *Isaacs*, 347 F. Supp. 743 (N.D.E.D. Ill. 1972); *U.S.* v. *Winsett*, 518 F. Supp. 51, (9th Cir. 1975); and *U.S.* v. *Edwards*, 441 F. 2d 749 (5th Cir., 1971).

In addressing the Court to the issue of whether or not the exclusionary rule should apply to subsequent trials of perjury, it is submitted that any attempt to distinguish between perjury trials and trials of substantive crimes be eliminated. Support for this rule has been advocated in the opinion of Mr. Justice Brennan in his dissenting opinion in *U.S.* v. *Calandra*, 414 U.S. 338, 355, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The crucial portion of the dissenting opinion stated

> "The protection provided for under the Fourth Amendment is equally extended to the actions of

> the Government and officers of the law acting under it. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance of the prohibitions of the Constitution, instead for the protection of the people against such unauthorized action." *Id*, 355-356.

Thus, we submit that the Government's position describing the exclusionary rule as merely a judicially creative remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect is in error. The more appropriate description of the exclusionary rule is that it is

> "part and parcel of the Fourth Amendment's limitation upon governmental incroachment of individual privacy and gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that which honest law enforcement is entitled and to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp* v. *Ohio*, 367 U.S. 343, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)

To distinguish the application of the Fourth Amendment as applicable to one type of procedure and not another, as the Government advances, is to "keep the words of promise to our ear and break it in our hope". *People* v. *Martin*, 382 Ill. 192, 196 (1942).

> "The Constitutional guarantee against unreasonable search and seizure protects all: both the innocent and the guilty." *U.S.* v. *Monroe*, 205 F. Supp. 175 (E.D. Louisiana, 1962).

Therefore, to permit the illegal action of Patrolman Biro in the instant case to redound to the Government's advantage impairs the Constitutional safeguard under consideration, and demands suppression. It is pertinent to recall

the historic admonition of Mr. Justice Brandeis, dissenting in *Olmstead* v. *U.S.*, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928):

> "If the Government becomes a lawbreaker, it breeds contempt for law, and it invites every man to become a law unto himself. It invites anarchy. To declare that in the administration of criminal law, the ends justify the means—to declare that the Government may commit crimes in order to secure a conviction of a private criminal, would bring terrible retribution."

See also *U.S.* v. *Edmons*, 432 F. 2d 577 (2d Cir., 1970).

Thus, it is apparent that the downgrading of the exclusionary rule to a determination of whether its application in a particular type of proceeding further deterrents of future police misconduct therefore reflects a startling misconception of both historical objective and the basic purpose of the rule.

POINT III

The trial court below properly suppressed the testimony of Lois Hennessey.

In an attempt to escape the logic of the effect of the exclusionary rule with respect to Ms. Hennessey's testimony, the Government takes the contention that the witness' testimony should not be excluded due to the fact that she is a "live witness". It is submitted that such a distinction is illogical and defeats the fundamental principles of the Fourth Amendment and the exclusionary rule. Interestingly enough, while the Government argues the theory of live witness with respect to Ms. Hennessey, they do not suggest that the testimony of Patrolman Biro should thereby be admissible although he is equally alive.

The reason they avoid this issue is due to the fact that a suggestion of this type could only serve to make a shambles of any pretense of deterrence in that it would allow the physical evidence to be suppressed but the illegal searcher to describe it with exactly the same force and effect. Thus, it is submitted why should the rule be different if a second police officer is present to allow him to testify because he is a live witness? Further, should the rule be different as to Ms. Hennessey who is a live witness to whom Biro revealed his ongoing illegal search, and thereby exploited it directly?

As the case law in this area reveals, the exclusionary rule has instructed us to decide these matters on a case by case basis taking into account a myriad number of factors. This procedure was employed by this Court over a decade ago in the case of *Wong Sun* v. *U.S.*, 371 US 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) where it was stated at Page 485 of that decision:

> "Verbal evidence which derive so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."

It was further stated at Page 486 of that decision:

> "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, or *Rea* v. *U.S.*, 350 U.S. 214, 76 S. Ct. 292, 100 L. Ed. 233 (1956), or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins* v. *U.S.*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960), the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction."

To allow the Government's differentiation would remove all restraint upon the unlawful police conduct by enabling them to use the derivative fruits of their legal search as long as they could find a "living witness" discovered indirectly by the search. It should also be apparent that this situation would also provide for the indiscriminate violation of an individuals' right to privacy. If logic is to prevail, the same rule of exclusion should follow from an illegal search whether the evidence be animate or inanimate, tangible or intangible, living or dead. Any conclusion to the contrary would be totally inconsistent with the basic Fourth Amendment liberties.

The Fifth Circuit dealt with the aspect of live testimony in the case of *U.S.* v. *Marder,* 474 F. 2d 1192 (1973). The Court stated on Page 1196:

> "Any other conclusion would be totally inconsistent with the fundamental purpose of the exclusionary rule; to instill respect in Government officers for a citizen's Fourth Amendment rights."

Numerous other federal cases have dealt with this same aspect. In the case of *Walder* v. *U.S.,* 347 U.S. 62, 64, 74 S.Ct. 354, 98 L. Ed. 2d 503 (1954), the Court stated:

> "It is settled law that the Government may not use the fruits of the unlawful conduct of its agent, that is, either physical or intangible evidence secured thereby, nor can it use evidence obtained through leads from the unlawfully obtained evidence. The evidence directly obtained and that obtained through such leads is tainted by the unlawful conduct." See also *Wong Sun* v. *U.S.,* supra at 484, 486, (1962); *Nardone* v. *U.S.,* 308 U.S. 338, 341, 343, 60 S.Ct. 266, 84 L. Ed. 307 (1939); *S. Etheridge* v. *U.S.,* 380 F. 2d 804, 808, (5th Cir., 1967); *U.S.* v. *Basurto,* 497 F. 2d 781, 783 (9th Cir., 1964); *Gissendanner* v. *Wainright,* 482 F. 2d 1293, 1295 (5th Cir., 1973).

In *U.S.* v. *Brignoni-Ponce,* 422 U.S. 873, 876, 95 S.Ct. 2574, 45 L. Ed. 2d 607 N.2 (1975) the Supreme Court expressly did not address itself to the suppression of voluntary testimony. The case there cited, *U.S.* v. *Guana-Sanchez,* 484 F. 2d 590 (7th Cir., 1973) expressly held that such testimony should, in fact, be suppressed. This is the rule in this Circuit. See *U.S.* v. *Tane,* 329 F. 2d 848 (2d Cir., 1964). The Fifth Circuit in the case of *Williams* v. *United States,* 382 F. 2d 48 (5th Cir., 1967) cited with approval this Circuit's decision in the *Tane* case.

In support of its position, the Government cites several cases involving express consent, abandoned property, a warrant with sufficient untainted probable cause and other cases which are totally inappropriate. *In the instant case* as in *U.S.* v. *Karanthanos,* 531 F. 2d 26 (2d Cir., 1976), Cert. Den. 428 US 910, *the official misconduct was both flagrant and deliberate, and the closeness between the original illegality and the witness' testimony is as clear in this case as it is possible to be upon an issue where the information rests entirely within the province of the Government agents and Government witnesses.*

In the instant case the patrolman knew he had no right to search, and therefore replaced the material seized so as to cover up the tracks he had no right to leave in the first place. He did, however, utilize the results of his search to interrogate and discover Government witness Hennessey, and thereby compounded his intrusion by exploiting his already illegal search. He looked into the envelope because of suspicion as to what it might contain despite the fact that there was nothing peculiar about the envelope. The actions of the patrolman were purposeful, deliberate and flagrant official misconduct. Certainly, he did not hesitate to exploit the results of his illegal search.

It is submitted by the defendant that the instant case presents the same exploitation of illegal testimony by the

Government. The Government would urge that the taint is purged by attenuation. The individual decision to speak should not alter the fact that his discovery has been obtained by the use of illegally obtained evidence, as in the case at Bar:

> "Once we focus on the relevant criteria, we will have gone a long way toward making analysis both tractable and serviceable to the deterrent ends of exclusionary rules by carefully defining what the inquiry should at most consist of; not useless inquiries as to the will or responsibility of the witness whose utterances are in question, but in inquiry directed solely at the responsibility of the prosecution and its agents for turning up that evidence—an inquiry that asks if the prosecution exploited the improper conduct of which it was guilty." (Ruffin, Out on a Limb of a Poisonous Tree: The Tainted Witness, 15 UCLA L.Rev. 32, 33 [1967])

A fair and careful review of the record below establishes that the District Judge was well within the realm of the trier of facts in concluding as he did that the search was illegal, that Miss Hennessey's testimony was the fruits of illegality, and that it was required to be suppressed. It is submitted that an application of facts in the case at Bar to the aforementioned holdings dictate the suppression of Hennessey's testimony as fruit of the poisonous tree. Any argument on the part of the Government with respect to an exception to the exclusionary rule on the basis of the fact that the evidence is that of a "live witness" should not be allowed. One of the ultimate questions to be asked by the Court is how the rights of the defendant have been affected by the actions of the Government.

> "If the rights of a citizen under the Constitutional safeguard against unreasonable searches and seizures are violated, any evidence so obtained for the use against the citizen in a criminal prosecution must be suppressed." *U.S.* v. *Macry,* 185 F.Supp. 144, 146 (D. Conn. 1960)

The distinction proposed by the Government with respect to tangible and intangible evidence has continually been rejected by the courts. In addition to authority already cited it should be noted that the Eighth Circuit has held:

> "Evidence tangible or intangible, directly or indirectly gained as a result of an illegal search is tainted fruit of the poisonous tree and is inadmissible." *Peterson* v. *U.S.,* 411 F. 2d 1074, 1078 (8th Cir. 1969)

No distinction remains, if ever one existed, between tangible evidence and "live witnesses" when determining what is, or is not, the fruit of the poisonous tree. Any other result is inconsistent with the deterrent rationale of the fruit of the poisonous tree doctrine.

POINT IV

The Government totally failed to establish that Lois Hennessey's testimony would have been discovered absent the illegal search.

The inevitable discovery exception has been found to serve well the theory of the exclusionary rule by denying the Government the use of evidence arrived at by exploitation of illegality and at the same time minimizing the opportunity for the defendant to receive an undeserved and socially undesirable bonanza. To establish the exception, the prosecution must

> "Satisfy the court, as a fact, that the proferred evidence would have been acquired through lawful sources of information even if the illegal act had never taken place. Since such act did in fact occur and further, did in fact produce the evidence, this is not a simple task." (Maguire, "How to Unpoison the Fruit, The Fourth Amendment and the Exclusionary Rule", 55 J. Krim. L.C.&P. S. 307, 317 [1964])

Miss Hennessey was specifically contacted at, and later in regard to, the December 18th incident. Her testimony relative to the defendant was the direct fruit of these inquiries. The evidence produced was far from the normal output of the investigation as it had been conducted up to, and after, the December incident. Indeed, it can be fairly said that the December search totally and radically altered the procedure used in this investigation, with regard to the defendant herein, so that it differed radically from every single other surveillance of business premises conducted on the same street during the same investigation by the same FBI agent.

As this Court is well aware, the test in the Second Circuit and elsewhere has never been whether it is inconceivable that the Government might through some unspecified fortuitous circumstance have stumbled across Miss Hennessey at some time in the future. Rather, the test employed requires that where it is clearly established through the Government's own witnesses that the illegal search was the actual source of the Government's information, and that prior to this illegal search the Government's attention had not focused on her in that capacity, the Government must bear the burden of establishing that Miss Hennessey's testimony would have been both discovered and procured in the normal course of its investigation. See *U.S.* v. *Falley,* 489 F.2d 33 (2nd

Cir. 1973); *U.S.* v. *Paroutian,* 299 F.2d 486 (2nd Cir. 1962); *U.S.* v. *Schipani,* 414 F.2d 1262 (2nd Cir. 1969); and *U.S.* v. *Tane,* 329 F.2d 848 (2nd Cir. 1964). The record below is convincing with respect to the fact that there is no way of which the Government could have obtained the identity of Miss Hennessey if it were not for the illegal search of Patrolman Biro. The entire path and subsequent history of the investigation indicates that no attempts were ever made to interview employees for fear of tipping off those being surveilled. This was true in 1973 as in 1974. The Government never departed from this procedure during the entire investigation, with the exception of Miss Hennessey.

Lois Hennessey was interviewed for the first time a month after she had ceased to be a part-time employee. No other employee of the shop was then interviewed, or had any information of value to supply to the FBI. The only ex-employee, Mrs. Pesce, was ever interviewed by, or apparently known to the FBI. It simply never crossed Agent Emory's mind to go looking for any past employee until, as a direct result of the illegal search, he sought out Miss Hennessey to obtain the details of the incident surrounding the illegal search.

The only evidence offered by the Government to avoid the obvious failure to question employees in both the 1973 and 1974 invstigations was the subpoening of other flower shop employees *after* the defendant's indictment, and the vague intentions of Agent Emory regarding employees in the future. This falls far short of the showing required by the case cited in the Petitioner's Brief. In *U. S.* v. *Cole,* 463 F.2d 163, 172 (2nd Cir. 1972) a saturation investigation of the particular defendant based on independent information of VAST SUMS OF CASH CONCEALED from the Government was involved. In addition, that case involved a *sustaining* of findings of fact *in favor* of the Government.

Here the Court found against the Government and the record supports, if not compels, that result. In *U. S.* v. *Evans,* 454 F.2d 813, 818-19 (8th Cir. 1972) the Court approved exclusion where there was no independent source and

> "The illegality directly led to the identity of the otherwise unknown witness without intervening factors of the attenuating character." Id. at 818.

The Court further stated:

> "Those cases which do not exclude the live testimony generally involve situations where the illegality did not directly result in the learning of the name of the informant used as a witness at the trial, or where there were substantial attenuating circumstances or an independent source."

It should be obvious to this Court that the exact opposite factual pattern was disclosed by the record below in the instant case. Thus the cases cited are not supportive of the Government's position because factually they are all significantly different and distinguishable. It is insisted that there is a total failure on the part of the Government to meet the burden of establishing either that Lois Hennessey's testimony was not sufficient to trigger the *type* of investigation which led to her, or that she would have been the normal output of the investigation conducted prior to the illegal search. *U. S.* v. *Falley,* 489 F.2d 483 (2nd Cir. 1973); *U. S.* v. *Paroutian,* 299 F. 2d 486 (2nd Cir. 1962); *U. S.* v. *Schipani,* 414 F.2d 1262 (2nd Cir. 1969); and *U. S.* v. *Tane,* 329 F.2d 848 (2nd Cir. 1964).

A fair and careful review of this record establishes the District Judge was well within the realm of the trier of facts in concluding as he did that the Government failed to meet its burden on the issue of attenuation. His decision in this regard should in all respects be affirmed.

POINT V

The inequitable conduct of the Government estops it from appeal or from asserting a claim of attenuation of taint.

It need hardly be argued that the foundation of law is equity. The maxims "He who seeks equity must do equity." and "He who seeks equity must come into court with clean hands." have governed the granting or denial of relief in our civil courts. Just as our courts will not permit a wrongdoer to profit from his wrongdoing nor will our courts grant relief to a party who is guilty of inequitable conduct, the courtroom door has also been barred to illegally obtained evidence and sanctions applied to trespassing prosecutors.

These principles of law are not limited to cases where the inequitable conduct is such as to enable the moving party to personally complain. Indeed, there is no requirement to plead the claim of inequitable conduct per se at all. The Court should apply this doctrine not to favor a defendant, but to protect the interests of the public. Indeed, the Court should act sponte sua to apply these principles at any stage of any proceedings where the inequitable conduct is brought to the Courft's attention. 30 CJS Equity, §97, pp. 1031-1032; 20 NY Jur. Equity, §112, p. 132; *McMullen* v. *Hoffman,* 174 US 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899); *General Electric Company* v. *Hygrade Sylvania Corp.,* 45 F.Supp. 714 (SDNY 1942); *Bell & Howell Co.* v. *Bliss,* 262 F. 131 (7th Cir. 1919); *Memphis Keeley Institute* v. *Leslie E. Keeley Co.,* 155 F. 964 (6th Cir. 1907); *Gynex Corp.* v. *Dilex Institute of Hygiene,* 85 F.2d 103 (2nd Cir. 1936).

Our courts in dispensing criminal law should be no less required to fashion a just remedy, not only to prevent injury to the presumedly innocent defendant who stands

before it, but to prevent the encouragement of wrongdoing by the prosecution as a policy instrument of a free Government. Our courts should never be required to render an inequitable decree. Our courts should never be justified in doing anything other than equity. *McCann* v. *Charm Power Company,* 211 NY 301 (1914). In sum, wherever the wrong is directly related to, or committed in regard to the subject matter in litigation, equitable relief has been denied, and properly so, to a civil litigant in cases ranging from a description of a wrong as unjust [*Seagirt Realty Corp.* v. *Chaznoff,* 13 NY 2d 282 (1964)]; reprehensible unconscientious or inequitable to immoral or unconscionable [*National Distillers & Chemical Corp.* v. *Sayopp Corp.,* 17 NY 2d 12 (1966)].

A review of the procedural due process rights and the substantive due process rights afforded to the accused defendant in a criminal case reveals that each and every one of them are based upon the equitable principles enunciated above:

1. The right to counsel at all stages of the criminal prosecution commencing with the accusatorial process, where a defendant is in custody of the police. No court will permit evidence obtained from such a defendant to be introduced against him in a criminal proceeding where he has not been advised of his right to counsel, right to remain silent, and further advised that anything he says could be held against him, and that if he cannot afford counsel it will be provided by the court. *Miranda* v. *Arizona,* 384 US 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2. The exclusion of evidence obtained as a result of an illegal search and seizure. *Mapp* v. *Ohio,* 367 US 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) reh. den. 368 US 871, 82 S.Ct. 23, 7 L.Ed.2d 72.

3. The exclusion of tainted identification through improper lineups or showups. *U.S.* v. *Wade,* 388 US 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1178 (1967); *Gilbert* v. *California,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967). *Stovall* v. *Denno,* 388 US 293, 87 S.Ct. 1907, 18 L. Ed. 2d 1199.

4. The requirement that the prosecutorial authorities supply the defendant with exculpatory evidence coupled with the sanction against the prosecutorial authorities for the suppression of same. *Brady* v. *State of Maryland,* 313 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

5. The requirement that an indigent defendant be provided with not only counsel, but transcripts and investigatory services at the Government's expense. *Griffin* v. *California,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 2d 891 (1956).

6. The requirement that the defendant be guaranteed a speedy trial *U.S.* v. *Ewell,* 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed. 2d 627 (1966).

7. The requirement that a defendant be afforded the protection of double jeopardy *Benton* v. *Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969).

The sword cuts both ways. In the landmark decision, *Harris* v. *New York,* 401 U.S. 722, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971). This Court determined that evidence illegally obtained by the Government, while not usable on the prosecution's case in chief against the defendant, may nevertheless be used for impeachment purposes in the event the defendant does take the stand on the theory that the courtroom door should not be open to perjury. In effect, the Court has stated that if the defendant seeks to avail himself of an opportunity to lie, his inequitable conduct in committing perjury will estop him from objecting to the introduction of otherwise illegally obtained

evidence against him for impeachment purposes or rebuttal. *Walder* v. *U.S.* 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 2d 503 (1954).

An analysis of the Government's conduct in this case, as set forth hereinabove in Points I through IV, amply demonstrates the unconscionable and inequitable conduct of the Government. By suppressing the fact of the illegal search and seizure until the eve of trial, the defendant was deprived of the opportunity to make a Rule 12 motion prior to the trial which would normally—except for good cause shown—which good cause was never demonstrated, have resulted in a pre-trial suppression of the illegally obtained evidence. Upon trial, such evidence would never have been admitted or considered by the trial judge, and the verdict would have been not guilty, upon which there would have been entered a judgment of acquittal.

By acting in the manner in which it did, the Government sought to take advantage of its own inequitable conduct in an attempt to create an appeal after trial, where otherwise none would exist. It could be argued that the Government would have had an opportunity to appeal a pre-trial determination that the evidence was obtained as a result of an illegal search and seizure by making the representation required by the Statute 18 USC §3731. However, that issue could then have been resolved at the proper time, and in the proper manner without prejudicing the defendant. Even if the Government would have been successful (which indeed they were not) in obtaining a judicial ruling permitting the introduction of what was otherwise ruled illegally obtained evidence, such an adverse pre-trial ruling would not have mandated the defendant's conviction. Trial strategy could have been altered. Different trial tactics could have been applied by trial counsel. Perhaps there would have been no waiver

of a trial by jury, and a jury could have acquitted. The disclosure of the otherwise suppressed Government witnesses at an earlier stage would have provided the defendant and his counsel an opportunity to explore the testimony and the circumstances. Other witnesses could possibly have been located to impeach or impair the credibility of Miss Hennessey and Patrolman Biro. All of this was denied to the defendant by the inequitable conduct of the Government.

It is thus obvious that by acting in the unconscionable manner in which it did, unwittingly aided by the trial court, the Government was able to obtain a verdict of guilty upon the use of the illegal evidence. When the trial court then overturned its guilty verdict by suppressing the otherwise considered illegal evidence, as authorized by Rule 12(e), the Government was thus placed in a superior position. If their position is corerct, that a right to appeal does exist through the trial court's decision, on the grounds that the decision was merely a dismissal rather than a judgment of acquittal, the Government can now argue that if the taint was attenuated, the guilty verdict must be reinstated. Cf. *U.S.* v. *Dinitz,* —— US ——, 96 S.Ct. 1075, 1081, 47 L. Ed. 2d 267 (1976).

If this Court permits such inequitable conduct on the part of the Government to be blessed with its approval, it would serve to encourage the Government to suppress revelation of its illegal searches and seizures until the last possible moment, rather than to reveal such information at the earliest possible moment. The Government would be encouraged to prevent pre-trial disposition of Rule 12 motions so as to encourage, without good cause shown, the judicial determination of Rule 12 motions at or after the trial in order to enable the Government to claim the right of appeal from an overturned guilty verdict, where otherwise there would have been no appeal

from a judgment of acquittal entered on an innocent verdict, even though based upon the suppression of illegally obtained evidence.

In view of the foregoing, this Court should deny the Government application for relief based upon its inequitable conduct. *The Government has not come before this Court with clean hands!*

CONCLUSION

By reason of the double jeopardy clause and the principle established under the theory of estoppel, the Governments appeal should be dismissed, or in the alternative the order of the District Court should be affirmed.

Dated: White Plains, New York
October 21, 1977

Respectfully submitted,

GREENSPAN, KANAREK, JAFFE & FUNK,
Attorneys for Defendant-Respondent.

LEON J. GREENSPAN,
JOSEPH D. DESALVO,
Of Counsel.